

# EXHIBIT 1

1

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF DELAWARE  
3  
4 ATTENTIVE MOBILE, INC., )  
5 Plaintiff, )  
6 v. ) C.A. No. 22-1163-CJB  
7 317 LABS, INC., d/b/a EMOTIVE, )  
8 Defendant. )  
9 ----- )  
10 ATTENTIVE MOBILE, INC., )  
11 Plaintiff, ) C.A. No. 23-87-CJB  
12 v. )  
13 STODGE INC., d/b/a POSTSCRIPT, )  
14 Defendant. )  
15 ----- )  
16 BRITISH TELECOMMUNICATIONS PLC )  
17 and BT AMERICAS, INC., )  
18 Plaintiffs, ) C.A. No. 22-1538-CJB  
19 v. )  
20 PALO ALTO NETWORKS, INC., )  
21 Defendant. )  
22 J. Caleb Boggs Courthouse  
23 844 North King Street  
24 Wilmington, Delaware  
25  
26 Friday, July 14, 2023  
27 9:45 a.m.  
28 Motions Hearing  
29  
30 BEFORE: THE HONORABLE CHRISTOPHER J. BURKE  
31 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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1 APPEARANCES:  
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14  
15 ASHBY & GEDDES  
16 BY: JOHN G. DAY, ESQUIRE  
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37  
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3

1 APPEARANCES CONTINUED:  
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30 Palo Alto Networks  
31  
32 \*\*\* PROCEEDINGS \*\*\*  
33  
34 09:38:58  
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1 DEPUTY CLERK: All rise.  
2  
3 THE COURT: Please be seated. Good morning,  
4 again. Take two.  
5  
6 Good to be with you all today. And I know we  
7 have all of counsel for our parties here and the court  
8 reporter. And we thank our court reporter for all her  
9 service.  
10  
11 And so, why don't we go on the record. And as  
12 we do, why don't I just say a few things for the record.  
13  
14 And the first is that we're here today, as the parties know,  
15 for a 101, Section 101 setting at least, in three cases.  
16  
17 Two of them are related.  
18  
19 The two related cases involve the same  
20 Plaintiff, that's Attentive Mobile Inc. The first of those,  
21 Civil Action Number 22-1163-CJB. The Defendant there is 317  
22 Labs, Inc. doing business as Emotive.  
23  
24 And in Civil Action Number 23-87-CJB, the  
25 Defendant is Stodge, Inc. doing business as Postscript.  
26  
27 And, then, in our last case, that case is *BT*  
28 *Americas Inc. vs. Palo Alto Networks, Inc.* It's Civil Action  
29 Number 22-1538-CJB here in our court.  
30  
31 And we're here today to address motions filed by  
32 the respective Defendants in the respective cases seeking  
33 dismissal of the respective Complaints, Section 101 claims.  
34  
35 Okay. Before we go further, let's have counsel

09:54:55 **1** for the parties identify themselves for the record. I think  
 09:54:58 **2** our Attentive Mobile cases are first. And so, we'll ask  
 09:55:04 **3** counsel for Plaintiff's side, and particularly start with  
 09:55:08 **4** Delaware counsel, to identify themselves.  
 09:55:09 **5** MR. FLYNN: Good morning, Your Honor. Michael  
 09:55:11 **6** Flynn from Morris Nichols on behalf of Attentive Mobile.  
 09:55:13 **7** With me today is Jonathan Weinberg, Ryan Schmid and Britton  
 09:55:17 **8** Davis from King & Spalding.  
 09:55:18 **9** Mr. Weinberg will be arguing today for  
 09:55:21 **10** Attentive. And in the gallery is Troy Lieberman from  
 09:55:23 **11** Attentive Mobile.  
 09:55:24 **12** THE COURT: Okay. Thank you. Welcome to you  
 09:55:26 **13** all.  
 09:55:26 **14** Let's have Defendants' counsel in both of the  
 09:55:30 **15** cases identify themselves. And, again, we'll start first  
 09:55:35 **16** with Delaware counsel.  
 09:55:37 **17** MR. BROWN: Good morning, Your Honor. Andy  
 09:55:38 **18** Brown from Potter Anderson on behalf of Defendant,  
 09:55:41 **19** Postscript. With me today are my colleagues, Bindu  
 09:55:45 **20** Palapura, also from Potter, gene Novikov from Morrison  
 09:55:50 **21** Foerster, and Vanessa Katz from Postscript.  
 09:55:52 **22** THE COURT: And who will be arguing?  
 09:55:54 **23** MR. BROWN: Mr. Novikov will be arguing.  
 09:55:57 **24** THE COURT: Thank you. We'll do the same for  
 09:56:00 **25** Emotive's counsel, and we'll start with Delaware counsel.

09:56:01 **1** MR. DAY: Good morning, Your Honor. John Day  
 09:56:02 **2** from Ashby & Geddes for Emotive. With me, Richard  
 09:56:07 **3** Martinelli from Orrick. And Mr. Martinelli will be  
 09:56:09 **4** presenting on behalf of Emotive.  
 09:56:11 **5** THE COURT: All right. Thank you.  
 09:56:13 **6** And going in the back of the courtroom, let's  
 09:56:16 **7** have introductions for our last case, which is the BT  
 09:56:21 **8** Americas case. And we'll begin with Delaware counsel. You  
 09:56:24 **9** can stay back there. You don't have to come all the way up  
 09:56:26 **10** to the podium.  
 09:56:27 **11** Mr. Rovner.  
 09:56:27 **12** MR. ROVNER: Good morning, Your Honor. Phil  
 09:56:29 **13** Rovner from Potter Anderson for the BT Plaintiffs. And with  
 09:56:31 **14** me, my co-counsel from the Proskauer firm in New York, Nolan  
 09:56:37 **15** Goldberg and Balda Vinti. Also, Edward Wang from Proskauer  
 09:56:41 **16** as well.  
 09:56:43 **17** As we said in our email to the Court that  
 09:56:45 **18** Mr. Goldberg will be arguing on behalf of BT.  
 09:56:47 **19** THE COURT: Okay. Thank you and welcome.  
 09:56:52 **20** We'll do the same for counsel on Defendant's  
 09:56:53 **21** side, starting with Delaware counsel.  
 09:56:54 **22** Mr. Farnan.  
 09:56:54 **23** MR. FARNAN: Good morning, Your Honor. Brian  
 09:56:54 **24** Farnan on behalf of Defendant. With me is Anish Desai,  
 09:56:58 **25** Priyata Patel, and Tom Yu. And Mr. Desai will be arguing.

09:57:02 **1** THE COURT: Okay. Thank you, counsel. Good  
 09:57:04 **2** morning again to all.  
 09:57:06 **3** All right. Counsel, so just by way of ground  
 09:57:09 **4** rules, I think we worked this all out ahead of time. So, we  
 09:57:12 **5** said the Attentive Mobile cases are going to go first. I  
 09:57:16 **6** allocated 30 minutes per side for arguments. We've got two  
 09:57:20 **7** different Defendants, although, obviously, the issues are  
 09:57:23 **8** related. So, we'll keep track of time up here, and I'll let  
 09:57:27 **9** you know when you've got about five minutes left in your  
 09:57:30 **10** time.  
 09:57:30 **11** And then after we hear arguments in that case,  
 09:57:34 **12** we'll hear arguments in the BT case. Maybe we'll take like  
 09:57:40 **13** a short break just to let counsel get things switched out at  
 09:57:43 **14** counsel table, hear arguments in the BT case. And then  
 09:57:47 **15** before we adjourn then for lunch, I always like to try to  
 09:57:53 **16** take advantage of the fact that we've got a lot of folks  
 09:57:56 **17** here who are thoughtful about the Section 101 issues which,  
 09:57:59 **18** as you all know, our court deals with to a great degree.  
 09:58:03 **19** And I appreciate the parties' letters. And in  
 09:58:07 **20** the letters, I sometimes ask the parties, Hey, you're not  
 09:58:11 **21** only here to address kind of the key cases that are most  
 09:58:14 **22** significant to their own motion, but also just some general  
 09:58:17 **23** concepts of Section 101 law that can be challenging. They  
 09:58:20 **24** did that in those letters. It was really helpful. And they  
 09:58:23 **25** pointed me to some case law that I either hadn't read or if

09:58:27 **1** I had read it, I had forgotten. So, I thank them.  
 09:58:30 **2** And so, I did want to ask you a couple of  
 09:58:33 **3** questions, just generally about the law, after we finish our  
 09:58:36 **4** arguments specifically in these cases. And one question  
 09:58:39 **5** that I'd like to get, if you have any thoughts, the benefit  
 09:58:43 **6** of your thoughts about is just kind of a general one. I  
 09:58:46 **7** wanted to mention it now, just so you can think about it  
 09:58:49 **8** while you have a break in the proceedings this morning.  
 09:58:51 **9** And that is, you know, is there any concept with  
 09:58:56 **10** regard to Section 101 jurisprudence and particularly how  
 09:59:01 **11** that jurisprudence is supposed to work at the Rule 12 stage,  
 09:59:04 **12** that you think that courts or litigants are generally  
 09:59:10 **13** getting wrong? Or do you think that the law is really  
 09:59:13 **14** telling us we should be thinking about it in a certain way  
 09:59:17 **15** or looking at it in a certain way, but you think that maybe  
 09:59:23 **16** courts generally or litigants generally really aren't quite  
 09:59:27 **17** looking at it in the right way, the way that the Federal  
 09:59:30 **18** Circuit really is telling us to do it, and the Supreme Court  
 09:59:32 **19** is telling us to do it.  
 09:59:33 **20** I guess another way of phrasing this is: What  
 09:59:35 **21** do you think is kind of the most misunderstood key principle  
 09:59:38 **22** about Section 101 law that you wish courts would get right?  
 09:59:42 **23** And I say that because I want to try to make sure I'm always  
 09:59:45 **24** thinking about these things in the right way and trying to  
 09:59:47 **25** get the issues right. And they are challenging issues, as

09:59:49 **1** we will see today with our motions.  
 09:59:51 **2** All right. So, not that you have to have any  
 09:59:54 **3** thoughts on that. But if you do, that's a question I think  
 09:59:57 **4** I would like the answer to.  
 09:59:58 **5** So, let's begin with our Attentive Mobile  
 10:00:01 **6** motions, and I'll turn to Defendant's counsel, as it's their  
 10:00:05 **7** motions, and that's how it was worked out who was going to  
 10:00:08 **8** go first.  
 10:00:11 **9** MR. NOVIKOV: Good morning, Your Honor. Gene  
 10:00:14 **10** Novikov of Morrison Foerster for Postscript. I'm going to  
 10:00:17 **11** take the lead. I'm going to try to save seven minutes or so  
 10:00:21 **12** for my colleague, Mr. Martinelli, and then five minutes for  
 10:00:25 **13** myself to come back and say more things after Mr. Weinberg  
 10:00:30 **14** is done. So, I'm going to try to do 18 here and see how I  
 10:00:34 **15** do.  
 10:00:34 **16** THE COURT: Okay. That's impressive.  
 10:00:36 **17** All right. Why don't we begin, and I'll stop  
 10:00:39 **18** you with any questions.  
 10:00:40 **19** MR. NOVIKOV: Okay. I think the right place to  
 10:00:42 **20** start in evaluating questions of eligibility for these sorts  
 10:00:47 **21** of software patents is looking at the specification to  
 10:00:51 **22** figure out what problem in the prior art the inventors were  
 10:00:55 **23** trying to solve and what improvement their patent was  
 10:00:59 **24** offering.  
 10:00:59 **25** So, this is the problem statement from the

10:01:02 **1** specification. It says, The problem that the inventors were  
 10:01:06 **2** trying to solve was that the process for users to respond to  
 10:01:11 **3** online offers and promotions was too long, and people would  
 10:01:16 **4** lose interest, and the vendor or the online vendor would  
 10:01:19 **5** lose their business.  
 10:01:20 **6** And --  
 10:01:21 **7** THE COURT: And if you could go back, because I  
 10:01:23 **8** think, you know, this portion of the spec is going to be key  
 10:01:26 **9** in Column 1. I wonder, though, whether, and I guess the  
 10:01:32 **10** question is whether you're short selling all that is being  
 10:01:36 **11** said here.  
 10:01:36 **12** So, certainly, I think, as you've noted in the  
 10:01:39 **13** briefing, there is a focus here on kind of the  
 10:01:47 **14** time-consuming nature of the prior art process. You know,  
 10:01:52 **15** and let's try to save time. Let's try to make this go  
 10:01:56 **16** quicker.  
 10:01:57 **17** And like for a Defendant in a Section 101 case,  
 10:01:59 **18** it makes sense that you would be focusing on that. I'll let  
 10:02:01 **19** you go on to that.  
 10:02:03 **20** Doing something quicker on a computer is not  
 10:02:06 **21** necessarily the kind of thing that might save the Plaintiff  
 10:02:09 **22** on eligibility issues. But isn't there also the component  
 10:02:12 **23** in here where the patent is essentially saying, Look, the  
 10:02:16 **24** way that computers worked with regard to this sign-up  
 10:02:23 **25** process was that they worked in a certain way, and that way

10:02:27 **1** isn't optimal. And so, we are going to make the computers  
 10:02:31 **2** work in a different way to function in a different way.  
 10:02:34 **3** Couldn't it be said that that's what's also  
 10:02:37 **4** being conveyed?  
 10:02:38 **5** MR. NOVIKOV: I appreciate that distinction, and  
 10:02:40 **6** I agree with the Court that the advance that's being  
 10:02:44 **7** proffered here isn't limited to just making things go faster  
 10:02:48 **8** or moving more efficiently. But the thing that I do want to  
 10:02:53 **9** point out is that the improvement that's being offered here  
 10:02:56 **10** isn't to a particular server, or a particular network or  
 10:03:01 **11** even a particular piece of software. It is saying the way  
 10:03:06 **12** that we are executing this notion of enrolling in an online  
 10:03:12 **13** promotion using computers isn't very good, and we're going  
 10:03:16 **14** to do it differently.  
 10:03:18 **15** And so, it is not, I don't think, an improvement  
 10:03:21 **16** to any particular computer functionality. It is saying,  
 10:03:27 **17** We've got this thing that's going on in the Internet, and  
 10:03:30 **18** we're going to try to figure out a way to do that better.  
 10:03:33 **19** And I think that that's different from an improvement to  
 10:03:38 **20** computer functionality in the way that the Federal Circuit  
 10:03:41 **21** has noted it.  
 10:03:42 **22** So, this might be a good place to address the  
 10:03:44 **23** *DDR Holdings* analogy that came up in the letter briefing.  
 10:03:49 **24** Right. So, in *DDR Holdings*, the invention was an  
 10:03:51 **25** improvement to the routine conventional function of an

10:03:55 **1** Internet hyperlink protocol. And the invention was an  
 10:03:59 **2** improvement to the way that hyperlinks worked. Right.  
 10:04:02 **3** Ordinarily, you click on a hyperlink, and it  
 10:04:05 **4** would go from one page to another page perhaps on a  
 10:04:08 **5** different server. And they had invented a new type of link,  
 10:04:12 **6** right. And it would work differently. Rather than  
 10:04:14 **7** transporting the user to a different website on a different  
 10:04:17 **8** server, it would automatically generate a brand new hyper  
 10:04:22 **9** website, a new type of link analogous to the new database  
 10:04:25 **10** that the Federal Circuit found embodied in the *Enfish*  
 10:04:29 **11** claims.  
 10:04:29 **12** Now, in the supplemental letter brief that was  
 10:04:32 **13** filed at Docket 43, the analogy that they draw to the *DDR*  
 10:04:37 **14** *Holdings* goes as follows. They say, In *DDR Holdings*, you  
 10:04:40 **15** have a new type of hyperlink that overwrote the conventional  
 10:04:44 **16** sequence of events. Their invention overrides the  
 10:04:46 **17** conventional sequence of events "ordinarily triggered by the  
 10:04:51 **18** click of an advertisement in the prior art mobile sign-up  
 10:04:54 **19** systems."  
 10:04:55 **20** And I think that's pretty telling because it  
 10:04:58 **21** seems to me to be an admission that they aren't improving  
 10:05:01 **22** the way that a computer works or a particular computer  
 10:05:03 **23** technology. They're improving the abstract idea of signing  
 10:05:08 **24** up for promotional offers on the Internet, right. And the  
 10:05:12 **25** way that they're doing it is by deploying this deeplinking

10:05:16 **1** technology that they admit in their patents and in their  
 10:05:18 **2** briefs is conventional, known and standardized.  
 10:05:22 **3** THE COURT: And I think maybe what you're saying  
 10:05:23 **4** is, you know, there could be different ways in which one  
 10:05:28 **5** attempts to utilize computers and computer software in an  
 10:05:32 **6** unconventional way. One way to do it is to literally create  
 10:05:37 **7** or talk about creating because sometimes in these patents,  
 10:05:40 **8** although they say, We're doing or creating something  
 10:05:42 **9** specific, they may not always explain exactly how, but it's  
 10:05:46 **10** to create a new type of functionality. A new type of -- you  
 10:05:53 **11** know, a particular way that software works that maybe has  
 10:05:58 **12** not been created before.  
 10:06:01 **13** But we know, you know, and this may be more of a  
 10:06:06 **14** step two thing, but we know that another way in which you  
 10:06:08 **15** can utilize computer technology, including software  
 10:06:13 **16** unconventionally for purposes of 101 law, is by utilizing  
 10:06:17 **17** otherwise known elements in an unconventional combination.  
 10:06:20 **18** And like I think when you're analogizing this to  
 10:06:23 **19** *DDR*, you're talking about the first thing, not a new way to  
 10:06:26 **20** use computers or software. But the other side may be  
 10:06:29 **21** focusing on the second thing, which it is a combination of  
 10:06:34 **22** both ways. Isn't that a different way to do it?  
 10:06:38 **23** MR. NOVIKOV: Absolutely. So, I think one thing  
 10:06:41 **24** that Federal Circuit law that has been clear about is you  
 10:06:45 **25** have a problem, at least to start with, when you're

10:06:48 **1** deploying computer technology that you admit, at least in  
 10:06:52 **2** pieces, in components, is known conventional to solve -- to  
 10:06:56 **3** kind of improve a business process like this. And so, the  
 10:06:59 **4** move that people make, exactly as you say, is, Well, we may  
 10:07:03 **5** be deploying conventional computer components to solve a  
 10:07:08 **6** business process, but we are arranging those components in a  
 10:07:12 **7** way that's new and in a way that hasn't been done before,  
 10:07:15 **8** right.  
 10:07:15 **9** And that's the *Finjan* case, the *BASCOM* case, and  
 10:07:20 **10** those are cases that say you've got some assertedly new  
 10:07:21 **11** configuration of elements or some change to the way that the  
 10:07:27 **12** components interact with each other that takes it out of the  
 10:07:30 **13** realm of abstract idea.  
 10:07:31 **14** And, of course, that's how the Court thought  
 10:07:33 **15** about the question in the *Nielsen* case that Your Honor  
 10:07:36 **16** highlighted for us in the Order preceding this hearing, like  
 10:07:39 **17** is there an arrangement that's sufficiently specific and  
 10:07:43 **18** particularized to give the Court assurance that what's being  
 10:07:45 **19** patented is new? And that's what they're trying to do here.  
 10:07:48 **20** THE COURT: And to make it more specific in  
 10:07:50 **21** terms of the graphic you have up on Slide 6, which I think  
 10:07:53 **22** comes from the other side's brief is, like, no question,  
 10:07:58 **23** were integration tags known? They were. Were websites  
 10:07:59 **24** known? They were. Was the concept of using URI with a  
 10:08:02 **25** deeplink known? Yes, no question. Was the concept of

10:08:04 **1** transferring data utilized or, you know, customized text  
 10:08:09 **2** messages, was that all known? Yes.  
 10:08:11 **3** I don't think they're even contesting that, and  
 10:08:15 **4** they're saying, Yeah, but the way we're putting it all  
 10:08:17 **5** together here, that was new.  
 10:08:18 **6** MR. NOVIKOV: That's right. And I think we are  
 10:08:21 **7** asking the Court to look beyond the terms that they're using  
 10:08:27 **8** and putting up on the screen in this diagram here and to  
 10:08:33 **9** consider what this actually all amounts to.  
 10:08:36 **10** So, I'm going to skip past this because I think  
 10:08:39 **11** we are sort of on the same page that, you know, the  
 10:08:42 **12** click-to-text server is just a server. The client server,  
 10:08:45 **13** we don't really know what it is at all. We just kind of  
 10:08:47 **14** infer that it serves web pages. The browser is a browser in  
 10:08:50 **15** the diagram. It's actually in the patent. Any sort of  
 10:08:53 **16** interface that a user has on a computer. And then the  
 10:08:58 **17** notion of an integration tag is completely abstract.  
 10:09:03 **18** I would love to hear today if there's going to  
 10:09:06 **19** be something that they're going to ask for in claim  
 10:09:08 **20** construction that's going to make it anything other than  
 10:09:10 **21** just code on a web page. But I think if you look at this,  
 10:09:13 **22** all of that in mind, all you have here in -- it's the part  
 10:09:18 **23** that I've circled in red -- is you're serving a web page  
 10:09:22 **24** that collects some user data, right. And all you have in  
 10:09:26 **25** this second piece, which is really the solution that they're

10:09:30 **1** claiming they developed to their problem, is this known  
 10:09:34 **2** conventional, indeed, standardized way of switching between  
 10:09:38 **3** one application to another using a deeplink, right.  
 10:09:43 **4** There are -- there's a listing in the '074  
 10:09:46 **5** patent, not just of the protocol, but of press coverage of  
 10:09:50 **6** the way that you would do this in the Android system and the  
 10:09:55 **7** MAC IOS system. And then all you have in part three is  
 10:09:57 **8** receiving a text.  
 10:09:59 **9** THE COURT: Can you just go back to the excerpt,  
 10:10:01 **10** though? Is it just the use of the URI with the deeplink? I  
 10:10:04 **11** mean, the patent talks about custom-generated deeplinks, and  
 10:10:08 **12** my sense is that the custom-generated part of what this  
 10:10:12 **13** patent says it's about is a nod towards, yeah, we're using,  
 10:10:18 **14** you know, deeplink technology via URIs.  
 10:10:21 **15** MR. NOVIKOV: So --  
 10:10:21 **16** THE COURT: But we're doing it in a way that  
 10:10:23 **17** customizes the resulting message. What do we mean by that?  
 10:10:29 **18** Well, we're going to be utilizing some data that is  
 10:10:31 **19** particular to the user or the public website at issue.  
 10:10:33 **20** Isn't it fair that it's more than just URIs and  
 10:10:36 **21** deeplinks?  
 10:10:37 **22** MR. NOVIKOV: So, a deeplink is, to some degree,  
 10:10:43 **23** customized by its nature because it's going to point  
 10:10:45 **24** somewhere in particular.  
 10:10:46 **25** THE COURT: From one app to another you're

10:10:49 **1** saying?

10:10:50 **2** MR. NOVIKOV: That's right. I take the one app

10:10:52 **3** to a specified place in the second app. I take Your Honor's

10:10:54 **4** point that the notion here is that it is going to customize

10:10:58 **5** based on some data that is received from the user.

10:11:03 **6** Note that it's not actually a requirement of all

10:11:05 **7** of the claims they're asserting. So, query how integral a

10:11:09 **8** part of their invention it really is.

10:11:11 **9** THE COURT: And on that, let me stop you there,

10:11:12 **10** because I think I saw on your slides, I may be conflating

10:11:16 **11** the cases, but am I right that some of your slides, maybe

10:11:19 **12** near the end, talk about how, well, you know, Look, the '887

10:11:24 **13** patent, Claim 1 says this, but not necessarily these other

10:11:27 **14** independent claims?

10:11:28 **15** MR. NOVIKOV: That's right.

10:11:29 **16** THE COURT: I guess my question is: In your

10:11:30 **17** briefing, did you ever say, Wait a second, it's not okay to

10:11:33 **18** just use any one of these independent claims referenced in

10:11:36 **19** the Complaint because, Look, this independent claim doesn't

10:11:39 **20** have this component, which the Plaintiff is now relying on.

10:11:42 **21** I don't think you did that.

10:11:43 **22** MR. NOVIKOV: That's fair, Your Honor. I mean,

10:11:45 **23** we did make a point that this was not an accurate

10:11:51 **24** representation of all of the claims. And I think there is

10:11:54 **25** one or two examples in both Defendants' briefs that say that

10:12:00 **1** specific things are not found in the claims. I concede that

10:12:05 **2** the particular granular comparison that's in the slides is

10:12:08 **3** not in the briefs.

10:12:09 **4** THE COURT: Let me let you continue.

10:12:10 **5** MR. NOVIKOV: The only point I was going to make

10:12:12 **6** is -- additional point is if we had claimed advances, Well,

10:12:18 **7** we're going to provide a personalized link, there is Federal

10:12:23 **8** Circuit case law, I think it is *7L*, but I'm going to

10:12:27 **9** double-check that and maybe get up and just say the name of

10:12:30 **10** the case after everybody is done, that a personalized URL is

10:12:34 **11** not sufficient.

10:12:36 **12** And that makes sense. Like the notion that

10:12:39 **13** you're going to point somebody to a place on the Internet

10:12:42 **14** based on something that they tell you doesn't feel to me

10:12:45 **15** like something that ought to get across the threshold.

10:12:49 **16** THE COURT: Is it clear, Mr. Novikov, that as to

10:12:52 **17** the first couple steps of your -- that the embedding of

10:12:58 **18** integration tags in web pages such that when those web pages

10:13:03 **19** are accessed, the tag sends data back to a server, was that

10:13:07 **20** known?

10:13:08 **21** MR. NOVIKOV: I mean, I think the notion of

10:13:16 **22** embedding some code in a web page that causes some user data

10:13:20 **23** to be sent back, I think it has to be true that that was

10:13:26 **24** known. Especially whereas here, the types of user data that

10:13:31 **25** are identified as being transmitted back is basically

10:13:35 **1** anything about the user at all. Other information

10:13:38 **2** identifying the user or user mobile device, the user viewing

10:13:44 **3** history, click history, user status, cookies.

10:13:46 **4** I mean, it doesn't, again, feel to me like the

10:13:50 **5** notion that you have put some code in a web page that it's

10:13:53 **6** going to send the user data back is something that they can

10:13:59 **7** credibly say wasn't a known thing.

10:14:00 **8** THE COURT: And maybe this gets to an issue, a

10:14:01 **9** step two issue I wanted to ask you about, which is, again,

10:14:04 **10** we talked about the difference between establishing that

10:14:06 **11** each individual piece of software or hardware that's

10:14:10 **12** referenced in the claim is known versus the difference

10:14:12 **13** between demonstrating or having the record demonstrate that

10:14:16 **14** the ordinary combination of those steps, the software or

10:14:18 **15** hardware, related steps are known.

10:14:21 **16** You cite *7L*/a bunch in your briefs, I think,

10:14:25 **17** for the idea that, you know, the way -- the ordinary use of

10:14:29 **18** the technology itself can't be -- can't help with regard in

10:14:33 **19** eligibility. But I think there what I'm looking for in the

10:14:36 **20** record is, Show me something in the record that says, Yeah,

10:14:39 **21** yeah, see, people were using integration tags embedded in

10:14:45 **22** websites that when accessed generated URIs with deeplinks

10:14:51 **23** that created custom text messages with user data and website

10:14:55 **24** data that related to some of the users. Show me that that

10:14:58 **25** was ordinary, not just the individual components, but show

10:15:01 **1** me that utilization of technology was ordinary.

10:15:04 **2** In your briefing when you're getting to that,

10:15:07 **3** that ordered combination argument you also make in step two,

10:15:10 **4** I don't see you citing anything for that. I mean, was it

10:15:13 **5** ordinary to use all these things in a computer software

10:15:17 **6** based way at the time?

10:15:18 **7** MR. NOVIKOV: I think -- well, so the place

10:15:24 **8** where I would go for this is the idea which was, obviously,

10:15:34 **9** that piece at least, which is the core of the solution that

10:15:37 **10** was admitted to be known.

10:15:40 **11** How does the deeplink work? Well, the deeplink

10:15:43 **12** is a link in an app or on a web page that is placed there,

10:15:48 **13** is served to the mobile device by a server, and it sends you

10:15:52 **14** somewhere else.

10:15:53 **15** I agree with the Court that there isn't

10:15:56 **16** something in the specification that you could point to and

10:15:59 **17** have a cite to that says, Well, all of this was known. I

10:16:03 **18** think if that had been in the specification, you wouldn't

10:16:06 **19** have -- this wouldn't have gotten past the Patent Office to

10:16:11 **20** begin with.

10:16:11 **21** THE COURT: We might not be here; right? We

10:16:13 **22** might not be here today; right?

10:16:15 **23** MR. NOVIKOV: Right. But I think what -- I

10:16:19 **24** think it is pretty easy to recognize, given how generic the

10:16:24 **25** descriptions of all of these elements are, that all that has



10:16:28 **1** happened here is they have taken deeplinking technology, and  
 10:16:31 **2** they have put it in the middle of, on one hand, serving a  
 10:16:36 **3** web page that has some code on it that causes some user data  
 10:16:43 **4** to be sent back. And, on the other hand, receiving a text  
 10:16:45 **5** and responding to the text by enrolling a user in a  
 10:16:49 **6** promotion.

10:16:49 **7** I really genuinely, in my heart, do not think  
 10:16:53 **8** that it is oversimplifying the claims to say that they are  
 10:16:58 **9** directed to causing a mobile device to send user data to a  
 10:17:03 **10** server with any sort of generic code on it. Use this  
 10:17:06 **11** standard deeplinking protocol to pre-fill a text message and  
 10:17:11 **12** receive a pre-filled text message and enroll the user in a  
 10:17:15 **13** promotion.

10:17:16 **14** Before the buzzer goes off for me, I appreciate  
 10:17:20 **15** the concern that the granular comparison between the claims  
 10:17:23 **16** and the description wasn't in the link. I do want to  
 10:17:26 **17** make -- I do want to linger for just a second, if the Court  
 10:17:29 **18** will allow me, on the notion that if what is supposed to  
 10:17:35 **19** provide sort of the how here and differentiate the claims  
 10:17:39 **20** from an abstract idea, the claims of two of the three  
 10:17:42 **21** patents don't say anything about multiple servers that could  
 10:17:46 **22** affect server or client server.

10:17:49 **23** And one of them doesn't say anything about an  
 10:17:51 **24** integration tag at all. And, in fact, says that the means  
 10:17:55 **25** for displaying the promotion can go straight to the mobile

10:17:59 **1** device from the only server in the claim.

10:18:02 **2** And so, if that's what's supposed to make the  
 10:18:04 **3** claims not abstract, then at least the '897 and the '074  
 10:18:09 **4** patent don't.

10:18:10 **5** THE COURT: And there that's a question of  
 10:18:11 **6** waiver, though. And you can, you know, when you get up for  
 10:18:13 **7** rebuttal, if you can point me to somewhere in your briefing,  
 10:18:17 **8** including in the reply brief, where you made that case. No,  
 10:18:22 **9** it's not enough to just treat these three independent claims  
 10:18:24 **10** the same for purposes of 101. You actually have to look at  
 10:18:28 **11** them individually, because even if they're right about that  
 10:18:30 **12** the one claim or one patent is directed to "X," Look, it  
 10:18:33 **13** doesn't have "Y."

10:18:35 **14** I'm not sure you did make that case, but if you  
 10:18:38 **15** didn't, it would be waived. If you did, though, I want to  
 10:18:41 **16** know. So, feel free to let me know when you get up for  
 10:18:43 **17** rebuttal.

10:18:43 **18** We'll stop you there. I have some questions,  
 10:18:45 **19** but maybe I can ask them to Mr. Martinelli and give you a  
 10:18:48 **20** chance in rebuttal to add to them as well.

10:18:50 **21** Okay?

10:18:51 **22** MR. NOVIKOV: Thank you, Your Honor.

10:18:52 **23** MR. MARTINELLI: Good morning, Your Honor.

10:18:57 **24** Richard Martinelli for Emotive.

10:19:00 **25** THE COURT: Good morning.

10:19:00 **1** MR. MARTINELLI: So, I want to go back to where  
 10:19:02 **2** you started with the background of the patent and really  
 10:19:06 **3** grappling with: How do you distinguish between, I think,  
 10:19:09 **4** using a computer as a tool, so using known processes in a  
 10:19:13 **5** computer to just implement an abstract idea, or a business  
 10:19:18 **6** plan or something that humans would normally do from  
 10:19:21 **7** something that's inventive and actually like integrates new  
 10:19:24 **8** technology?

10:19:24 **9** And I think in this case, it's pretty easy  
 10:19:27 **10** because you can analogize things to real-world situations.  
 10:19:31 **11** So, this is a way to get people to be engaged with  
 10:19:35 **12** promotions and to respond more efficiently, and more fluidly  
 10:19:41 **13** and with less friction.

10:19:43 **14** That's a business problem. That's a human  
 10:19:45 **15** problem. That existed before the Internet.

10:19:48 **16** And we talk about in our briefs the fact that  
 10:19:50 **17** there were things like postage-paid cards. So, let's think  
 10:19:56 **18** about that scenario and how it compares to what we're  
 10:20:00 **19** talking about here with the same problem on the Internet.

10:20:04 **20** Now, if you recognized, well, you know, it's  
 10:20:07 **21** kind of a hassle for somebody to go and realize, I want to  
 10:20:11 **22** get a subscription to Time, and fill out my address on the  
 10:20:15 **23** subscription to Time or to renew my subscription to Time and  
 10:20:20 **24** go out and get a stamp and do all of those things.

10:20:22 **25** You say, Hey, postage-paid cards exist.

10:20:28 **1** Printing technology exists. Printed technology exists where  
 10:20:32 **2** you can customize that printing so it says, you know, Judge  
 10:20:37 **3** Burke, we've got an offer for you. That's things that have  
 10:20:39 **4** happened for a while.

10:20:40 **5** If you said, Oh, well, nobody's ever sent, you  
 10:20:44 **6** know, a customized message to Judge Burke with a postage  
 10:20:48 **7** stamp on it using all this existing printing technology,  
 10:20:53 **8** that's still just an abstract idea. That's still just a  
 10:20:55 **9** business method. That's something that isn't creating new  
 10:20:59 **10** technology.

10:21:00 **11** That's what we have here, right, the ability to  
 10:21:05 **12** have an integration tag which is, just as counsel said, some  
 10:21:09 **13** code that sends information back. The patent talks about  
 10:21:12 **14** cookies. Cookies are old. Cookies get information about a  
 10:21:15 **15** user and send it back to a server so that the server knows  
 10:21:18 **16** about the user.

10:21:19 **17** THE COURT: Was it known to utilize integration  
 10:21:22 **18** tags or their equivalent embedded in web pages such that  
 10:21:26 **19** when one accesses the page, it would automatically send that  
 10:21:29 **20** data back to a server?

10:21:30 **21** MR. MARTINELLI: That's what a cookie does. So,  
 10:21:32 **22** the cookies are ways to embed information about a user in  
 10:21:34 **23** their browser. And so, when you go to a new web page, the  
 10:21:39 **24** page can say, Let me look at this user's cookies and send  
 10:21:42 **25** that information back so, oh, I know, because Judge Burke

10:21:46 **1** went to Amazon, and Amazon put a cookie, I can read Amazon's  
 10:21:52 **2** cookie and see that, you know, he likes -- I don't know. I  
 10:21:54 **3** don't want to guess what you like -- fishing. So, that was  
 10:21:58 **4** known.  
 10:21:58 **5** Then, the other part that's known is the  
 10:22:00 **6** customization of the deeplink, right. So, deeplinks were  
 10:22:05 **7** customizable. They didn't invent a way to put specific text  
 10:22:09 **8** into the message that's created on the SMS. That was part  
 10:22:13 **9** of the standard. They don't purport to invent advantages or  
 10:22:17 **10** new forms of deeplinks. They take existing deeplinks.  
 10:22:20 **11** So, what you have is just like my real-world  
 10:22:23 **12** analogy where you say, Okay, well, we can print things that  
 10:22:25 **13** are individualized and postage stamps exist. Let's just  
 10:22:29 **14** send somebody a printed postcard with their information on  
 10:22:32 **15** it.  
 10:22:33 **16** So, I think when you look at it that way and you  
 10:22:35 **17** compare those two situations, you can see there's no  
 10:22:39 **18** technological innovation that's happening. You're using  
 10:22:43 **19** existing tools to do a business process.  
 10:22:45 **20** THE COURT: And let me just stop you there. I  
 10:22:47 **21** think what you said so far is, Look, is the concept of  
 10:22:49 **22** embedding an integration tag on a website such as that when  
 10:22:53 **23** one accesses it, user-related data is sent back to a server,  
 10:22:57 **24** was that known and used and done at the time? Yes, it's the  
 10:23:00 **25** concept essentially of using cookies on a web. On a web,

10:23:03 **1** that was well known.  
 10:23:04 **2** Is the concept of not only just utilizing a URI  
 10:23:07 **3** with a deeplink where you go from one app to another, but  
 10:23:09 **4** having that to create a custom text message, was that known?  
 10:23:12 **5** Sure it was.  
 10:23:13 **6** Hearing you say that, you know, Mr. Martinelli,  
 10:23:17 **7** he sounds very thoughtful. I wouldn't be and couldn't be  
 10:23:20 **8** citing to Mr. Martinelli's argument, right. I would need to  
 10:23:24 **9** make sure I have in the record is clear enough.  
 10:23:26 **10** I mean, essentially what's happening at this  
 10:23:28 **11** stage is you are relying on the clear kind of, you know,  
 10:23:33 **12** no-doubt-about-it presence of an affirmative defense that  
 10:23:35 **13** wipes out, you know, the patent affirmative defense. The  
 10:23:40 **14** patent never even really needed to talk about the Complaint.  
 10:23:42 **15** So, it's like I need the record to show me.  
 10:23:44 **16** Is there record evidence that each of those two  
 10:23:46 **17** separate pieces we just talked about were well known in that  
 10:23:49 **18** way?  
 10:23:49 **19** MR. MARTINELLI: Yeah, and I think counsel cited  
 10:23:51 **20** it in his slides. It's just citing to the patent where, you  
 10:23:55 **21** know, it -- when you asked the question about what's the  
 10:23:59 **22** part that people get wrong in doing 101 analysis? I think  
 10:24:03 **23** it's often like rigidly tying to the, I must only look at  
 10:24:07 **24** step one during step one. And I must only look at step two  
 10:24:10 **25** during step two, because I think it's more complex than

10:24:13 **1** that.  
 10:24:13 **2** When you go to say, Okay, where's the beef?  
 10:24:15 **3** Where's the technology? What did they invent? You go back  
 10:24:18 **4** to the specification. And when they say, Oh, did you invent  
 10:24:21 **5** a way to send information back to a user or from a user?  
 10:24:27 **6** They say, No, we just used cookies.  
 10:24:28 **7** Did you invent a way to create a customized  
 10:24:31 **8** link? No, just used existing deeplinks.  
 10:24:33 **9** So, that's where the: Is there something more  
 10:24:35 **10** and really focus on what technology was invented that comes  
 10:24:39 **11** in and really emphasizes the fact that there is no  
 10:24:44 **12** technological solution.  
 10:24:46 **13** It's also the thing that addresses *DDR*, where in  
 10:24:48 **14** *DDR* at least, there was the new form of web page that merges  
 10:24:53 **15** two different web pages together. That's a new form of web  
 10:24:57 **16** page technology.  
 10:24:59 **17** Here, there's no allegation that there's any new  
 10:25:03 **18** technology. It's just using these tools that exist in a way  
 10:25:08 **19** that accomplishes this abstract business core.  
 10:25:11 **20** THE COURT: You say that there's no allegation,  
 10:25:13 **21** but, again, this may depend on whose burden is it, and why.  
 10:25:18 **22** But you know, if I'm unclear, if I'm unsure, if the record  
 10:25:25 **23** doesn't clearly say "X," you know, do I hold that against  
 10:25:27 **24** the patentee?  
 10:25:28 **25** MR. MARTINELLI: Yeah. And when I say

10:25:29 **1** "allegation," I mean reading the words of the patent. When  
 10:25:32 **2** you look in the patent, the patent doesn't even purport to  
 10:25:35 **3** say that they're inventing new technology in these places.  
 10:25:38 **4** That's what we cited to, and we presented that  
 10:25:42 **5** case. They didn't respond with any evidence to contradict  
 10:25:46 **6** it and say, Oh, no. In fact, here's the place where we  
 10:25:49 **7** invent new technology.  
 10:25:50 **8** And I think there's a little bit of an issue of  
 10:25:53 **9** proving a negative, right. We read the patent. The patent  
 10:25:57 **10** says all of this is conventional. We put it in our briefs  
 10:25:59 **11** that all of this is conventional. And what more can we do?  
 10:26:05 **12** They didn't point to anything and say, No, this is the heart  
 10:26:07 **13** of it.  
 10:26:07 **14** And I do want to get to one additional issue  
 10:26:10 **15** that's unique to my motion and my effort to rely on *Bot MS*  
 10:26:16 **16** to show that there's a fundamental inconsistency in the way  
 10:26:20 **17** that they're pleading the case against Emotive. And what  
 10:26:24 **18** they say their patents actually taught in the claims. And  
 10:26:28 **19** that gets right to the heart of what I've highlighted here.  
 10:26:31 **20** We didn't have the benefit of this  
 10:26:33 **21** lawyer-created formulation of what the patent is about when  
 10:26:37 **22** we did our brief. This came in in response to Postscript's  
 10:26:42 **23** brief.  
 10:26:42 **24** And here, and also in Attentive's briefing at  
 10:26:47 **25** Page 3, they basically say, What we have is a system where



10:26:52 **1** the integration tag goes on to a web page. The web page  
 10:26:56 **2** goes on to on a browser to a specific user. That user data  
 10:27:00 **3** comes back to the click-to-text server. And then that user  
 10:27:04 **4** data and that information that comes back is used to  
 10:27:07 **5** generate a custom deeplink.  
 10:27:09 **6** Now, there's no dispute about how Emotive's  
 10:27:13 **7** service operates. We don't create a deeplink in this  
 10:27:17 **8** dynamic fashion. Our customers create a deeplink with  
 10:27:22 **9** whatever sort of message they want to put in the message  
 10:27:25 **10** field in advance of ever serving anything to any customer.  
 10:27:28 **11** So, we get a deeplink. The customer decides  
 10:27:33 **12** what the subscribe word should be. They put the subscribe  
 10:27:36 **13** word in. And that's a static link that goes out to all the  
 10:27:39 **14** customer -- all the users that the customer wants to serve  
 10:27:41 **15** it to.  
 10:27:42 **16** They show that in the Complaint. We've shown  
 10:27:45 **17** how that's all they plead about, what's in the Complaint.  
 10:27:48 **18** But the claims require this customization that they're now  
 10:27:52 **19** relying on to show how they have a complicated system that's  
 10:27:55 **20** inventive. And what they've pled is that Emotive doesn't  
 10:27:59 **21** have that. And in the *18* case, when you have a pleading  
 10:28:03 **22** that's directly contradicted by what you say your claim is,  
 10:28:07 **23** when there's a contradiction between what you say you're  
 10:28:10 **24** accusing and what your claim requires, dismissal is  
 10:28:12 **25** appropriate, and that's why we asked for that.

10:28:15 **1** THE COURT: And, again, because what it sounds  
 10:28:18 **2** like here, part of what you were saying, it sounds like a  
 10:28:21 **3** non-infringement argument. But --  
 10:28:23 **4** MR. MARTINELLI: It's a pleading argument  
 10:28:26 **5** because they pled that the way the -- in the Complaint, the  
 10:28:32 **6** way the Emotive system operates is that the business that  
 10:28:36 **7** wants to create the deeplink using our service creates that  
 10:28:40 **8** ahead of time and chooses a subscribe word. That's in the  
 10:28:45 **9** Complaint. If you look at our briefing, we point where that  
 10:28:47 **10** is.  
 10:28:47 **11** There's nothing in the Emotive system, and they  
 10:28:50 **12** don't plead anything that shows that the customization that  
 10:28:54 **13** they show here that they're now relying on as being their  
 10:28:57 **14** invention is performed by Emotive. In fact, the pleading  
 10:29:01 **15** shows that Emotive works a different way. It doesn't do  
 10:29:03 **16** this real-time customization. It has preset links.  
 10:29:07 **17** THE COURT: Okay. And maybe on rebuttal, you  
 10:29:11 **18** could point me in your briefing where you made these points,  
 10:29:14 **19** and so I can make sure I take it into account. I guess  
 10:29:18 **20** one -- and you've used almost all of the rebuttal time, but  
 10:29:21 **21** I know, in fairness, we have two Defendants here. We want  
 10:29:23 **22** to make sure that they're able to make independent points  
 10:29:27 **23** about their cases. So, I'll give the Defendants' side and  
 10:29:30 **24** the Plaintiff's side a few extra minutes.  
 10:29:32 **25** The one last question I need to ask you is: You

10:29:34 **1** know, I think the asserted abstract ideas that the claims  
 10:29:40 **2** are directed to, in Defendants' view, you have slightly  
 10:29:43 **3** different ideas. But I'll just use Postscript's for now,  
 10:29:46 **4** but they're similar. You know, something like you've said,  
 10:29:52 **5** streamlining the process for a customer to enroll in a  
 10:29:55 **6** marketing promotion providing a pre-filled and pre-addressed  
 10:29:59 **7** request.  
 10:30:01 **8** Postscript's here is the same. That's what they  
 10:30:03 **9** address. That's what these claims focus on. That's what  
 10:30:05 **10** this patent is all about. It's simply about the broad  
 10:30:07 **11** concept of streamlining the process for a customer to enroll  
 10:30:10 **12** in a marketing promotion by providing a pre-filled and  
 10:30:14 **13** pre-addressed request.  
 10:30:15 **14** And if you look at everything about the patent,  
 10:30:16 **15** the patent's title, its abstract, its background, it's  
 10:30:20 **16** saying, We're about something more narrow than that. Right.  
 10:30:24 **17** We're about the use of these custom-generated deep links to  
 10:30:28 **18** do that.  
 10:30:29 **19** And I guess the thing that I have trouble  
 10:30:32 **20** reconciling is, you know, if a patent's title was popcorn  
 10:30:38 **21** and it's -- you know, its abstract says, We're about  
 10:30:42 **22** popcorn. And the claim says, Popcorn, popcorn, popcorn.  
 10:30:45 **23** And then the Defendant said, This is a patent  
 10:30:47 **24** about food. It would just seem off. Like, how can the  
 10:30:51 **25** focus of the thing not include reference to the thing that

10:30:56 **1** the patentee keeps saying the patent is all about?  
 10:30:59 **2** Is there anything you can say in response as to  
 10:31:01 **3** why it is fair to say the patent is mostly directed to the  
 10:31:04 **4** kind of more abstract idea that you're talking about?  
 10:31:08 **5** MR. MARTINELLI: I think the way to get at that  
 10:31:10 **6** is if you take an abstract idea, like we articulated it in  
 10:31:14 **7** the briefs, you can't get a patent for just applying it to  
 10:31:17 **8** every new piece of technology that comes along. And here,  
 10:31:21 **9** that's what they did.  
 10:31:22 **10** So, what you're pointing to where they're  
 10:31:24 **11** saying, No, it's a custom message in this context of an SMS,  
 10:31:28 **12** well, that's just applying that abstract idea of creating a  
 10:31:31 **13** custom message just like a postcard and applying it to using  
 10:31:35 **14** an SMS on a computer.  
 10:31:37 **15** If ten years from now everybody's using AR/VR  
 10:31:41 **16** and somebody says, Oh, I want to create a custom message  
 10:31:44 **17** that uses the AR/VR environment to do it and just takes that  
 10:31:48 **18** same idea and says, Oh, here's how in the AR/VR environment,  
 10:31:52 **19** you create a custom message. That would have the same  
 10:31:54 **20** problem.  
 10:31:55 **21** So, I think fundamentally when you look at it,  
 10:31:57 **22** the concept over and over again streamlining and making  
 10:32:01 **23** things go smoothly. The only technology that actually makes  
 10:32:04 **24** things go smoothly in here is the deeplinks, which they  
 10:32:07 **25** admit they didn't invent, right. Like that's really where

10:32:09 **1** the technology gives you the smooth interaction because it  
 10:32:13 **2** gives you a link that you click. It opens up your SMS tool  
 10:32:18 **3** and then you hit send.  
 10:32:19 **4** That's what a deeplink does. That's the heart  
 10:32:23 **5** of the smoothness that they want to do. And I think  
 10:32:26 **6** applying that to just the world of a mobile phone where you  
 10:32:30 **7** have an SMS isn't anymore of an eligible concept than if you  
 10:32:34 **8** applied it to postcards, or if you applied to the telegraph  
 10:32:37 **9** or if you applied it to any other technology that happens to  
 10:32:40 **10** come along.  
 10:32:41 **11** THE COURT: Okay. All right.  
 10:32:42 **12** Thank you, Mr. Martinelli. We'll leave it  
 10:32:44 **13** there. I'll give the Defendants' side an additional five  
 10:32:48 **14** minutes, the Plaintiff's side as well.  
 10:32:50 **15** Let me hear from Plaintiff's counsel.  
 10:32:56 **16** MR. WEINBERG: Good morning, Your Honor.  
 10:32:57 **17** Jonathan Weinberg for Plaintiff, Attentive Mobile. It's a  
 10:33:03 **18** little bit tough to respond to all of that. There's a lot  
 10:33:05 **19** going on there. There's a lot of trial mixing between the  
 10:33:10 **20** 101 doctrines.  
 10:33:12 **21** But I think that, ultimately, what the argument  
 10:33:14 **22** here is is that each one of these components was a known web  
 10:33:19 **23** technology, and, therefore, it would have been obvious to  
 10:33:23 **24** arrange them together in this combination to make a new  
 10:33:28 **25** sign-up system. And that's, obviously, an obviousness

10:33:32 **1** analysis. It's not a 101 analysis.  
 10:33:34 **2** 101 analysis asks something different. It says:  
 10:33:37 **3** Is this a result? Are you trying to patent the idea of  
 10:33:41 **4** mobile sign-up where it does not matter what process or  
 10:33:46 **5** machinery that result is accomplished? And I'd like the --  
 10:33:50 **6** THE COURT: Streamlining mobile sign-up,  
 10:33:53 **7** streamlining email, that's what the Defendants are saying  
 10:33:55 **8** essentially is this is all about. It's directed to, you  
 10:33:58 **9** know, streamlining a process where a customer can enroll in  
 10:34:01 **10** a marketing promotion.  
 10:34:03 **11** MR. WEINBERG: Well, I think that's true.  
 10:34:04 **12** That's the way they phrase it.  
 10:34:06 **13** THE COURT: That's how they're framing it.  
 10:34:07 **14** MR. WEINBERG: The same way. But that's a goal,  
 10:34:09 **15** right. You want to build a better mousetrap. The goal is  
 10:34:11 **16** not -- it's not directed to the idea of improving  
 10:34:15 **17** mousetraps. It's new implementation of a mousetrap.  
 10:34:18 **18** So, this is a new improved mobile sign-up  
 10:34:20 **19** system. And I think that where Mr. Novikov started is  
 10:34:24 **20** exactly the place to start. What did the inventors say the  
 10:34:27 **21** problem was? What was the prior art and how did they  
 10:34:30 **22** improve upon it?  
 10:34:31 **23** The phrasing that I like from the Federal  
 10:34:33 **24** Circuit is how a solution specifically improves the function  
 10:34:36 **25** of the prior art systems. And, here, the pleadings have a

10:34:40 **1** very clear invention narrative, right. They discuss at  
 10:34:42 **2** least two prior art systems for getting mobile sign-ups.  
 10:34:49 **3** That is a website approach and vendor application approach.  
 10:34:55 **4** If you look at the specification, the Complaint  
 10:34:56 **5** and the articles attached to the Complaint, at least in the  
 10:34:59 **6** Postscript Complaint, those do lay that out. So, it's worth  
 10:35:04 **7** just taking a moment to say what those prior art systems  
 10:35:06 **8** were and how this is different.  
 10:35:09 **9** The traditional system is a website. So, you're  
 10:35:11 **10** browsing, you click on a link that redirects you to another  
 10:35:17 **11** website where you have to enter in the information, your  
 10:35:19 **12** phone number. Because of the laws involved here, it has to  
 10:35:23 **13** be a verification. So, the system would send you a text  
 10:35:27 **14** message saying, Please reply yes in order to subscribe. You  
 10:35:32 **15** reply yes, and then you would be subscribed.  
 10:35:35 **16** And so, we counted that. That's 13 taps, and  
 10:35:38 **17** that's a problem. The Complaint talks about that in  
 10:35:43 **18** Paragraph 37 about how it requires the user to enter a phone  
 10:35:45 **19** number. It messages.  
 10:35:46 **20** The other approach is you download an  
 10:35:49 **21** application, and you enter in a user name, a password. You  
 10:35:53 **22** sign up and it's able to then send you messages. This is  
 10:35:57 **23** discussed in the articles that were attached to the  
 10:36:01 **24** Complaint at Footnotes 4, 5 and 6, this vendor application  
 10:36:05 **25** approach.

10:36:05 **1** Now, both of these had problems. All right.  
 10:36:07 **2** The problems are also laid out in the pleadings, again, in  
 10:36:10 **3** the specification, the Complaint and the articles. For  
 10:36:13 **4** example, the introduction, which we talked about, said it  
 10:36:16 **5** was burdensome to type out all these numbers for your phone  
 10:36:19 **6** number. The Complaint, Paragraph 37, says you also had  
 10:36:23 **7** typos in those phone numbers. This was a problem.  
 10:36:25 **8** And so, there was --  
 10:36:27 **9** THE COURT: Just to stop you there, and I guess  
 10:36:30 **10** he talked about this, Mr. Novikov, a little bit. There's  
 10:36:33 **11** one way to look at what like Column 1 is saying, that what  
 10:36:39 **12** it is emphasizing in terms of what is different or what the  
 10:36:44 **13** patent does is simply about saving time and saving typing or  
 10:36:54 **14** taps.  
 10:36:56 **15** There may be another way to look at it that,  
 10:36:58 **16** yeah, it's about that, but it's also about a fundamentally  
 10:37:04 **17** different way that computers are working to get you to a  
 10:37:08 **18** place in which you might be saving time. The Defendant is  
 10:37:15 **19** emphasizing, I think, the former. Let's save time. Let's  
 10:37:17 **20** do it faster. Right. I think you're emphasizing the  
 10:37:22 **21** latter.  
 10:37:22 **22** Is it an improvement in computer functionality?  
 10:37:26 **23** If it is the latter, exactly how is it the latter?  
 10:37:30 **24** MR. WEINBERG: Well, so I'd just like to make a  
 10:37:33 **25** distinction there between the two inquiries. The

10:37:36 **1** specificity is this specific combination and a separate  
 10:37:38 **2** inquiry recognized by the Federal Circuit as: Is this a  
 10:37:43 **3** specific improvement to technology? Is this a new  
 10:37:45 **4** technology?  
 10:37:46 **5** So, those are separate. And we've been talking  
 10:37:48 **6** about the specificity inquiry.  
 10:37:50 **7** If we switch over to the technical invention  
 10:37:53 **8** inquiry, as you already noted, and *BASCOM* is probably most  
 10:37:58 **9** familiar to you, that arranging known components in a new  
 10:38:02 **10** combination that achieves an improvement is an inventive  
 10:38:06 **11** concept. Because, as the Supreme Court recognized in *KSR*,  
 10:38:10 **12** all inventions ultimately are some combinations of known  
 10:38:13 **13** components. And there's no requirement that in order to be  
 10:38:16 **14** eligible, one of these components has to be a new kind of  
 10:38:20 **15** deeplink, or a new kind of text messaging application, a new  
 10:38:23 **16** kind of server.  
 10:38:25 **17** Software applications are patent eligible. We  
 10:38:29 **18** see that throughout the case law. Even *DDR* was the first  
 10:38:33 **19** post-Alice case to discuss the technical requirement,  
 10:38:37 **20** introduce the technical requirement into the jurisprudence.  
 10:38:41 **21** And what was that? It was a web application,  
 10:38:43 **22** right. It wasn't a new kind of computer, a new kind of  
 10:38:45 **23** chip.  
 10:38:46 **24** The next case to talk about it was *Enfish*. That  
 10:38:49 **25** was a new database application. It wasn't a new operating

10:38:52 **1** system or a new processor. And it goes on and on and on,  
 10:38:56 **2** and it makes sense.  
 10:38:57 **3** Just as an aside, too, maybe this is something  
 10:39:00 **4** we can discuss later, I think the technical invention  
 10:39:03 **5** inquiry was not only difficult to apply, but also seems a  
 10:39:06 **6** bit contrary to Supreme Court case law.  
 10:39:09 **7** *Blisk*, for example, an improvement to business  
 10:39:12 **8** method not involving computers at all. Is it eligible? So,  
 10:39:15 **9** it's not exactly clear what this inquiry is even about, but  
 10:39:18 **10** I'll save my quantification for another time.  
 10:39:22 **11** THE COURT: I guess maybe what I'm trying to get  
 10:39:25 **12** at is, you know, in different ways, I think the law is  
 10:39:28 **13** asking us, and maybe this is more often a step two, but it's  
 10:39:37 **14** asking us to try to understand what is the difference  
 10:39:43 **15** between the assertedly inventive claim from the way  
 10:39:47 **16** computers were used before?  
 10:39:50 **17** And maybe the reason why it's asking us that  
 10:39:52 **18** question is we know that just saying, Do it on a computer,  
 10:39:57 **19** it would be faster on a computer, isn't enough for the  
 10:40:00 **20** Supreme Court. And so, if you can demonstrate that the  
 10:40:05 **21** utilization of computer software was unconventional, maybe  
 10:40:13 **22** that's a way of demonstrating it's not just like pending, do  
 10:40:16 **23** it on a computer, i.e., abstract idea, plus nothing that  
 10:40:21 **24** matters. It's about pending something significant vis-à-vis  
 10:40:26 **25** the way that the computer is used.

10:40:29 **1** I guess I'm wondering what you think it is that  
 10:40:31 **2** was the significant functionality add that the claims  
 10:40:36 **3** utilized vis-à-vis the way prior computer systems worked.  
 10:40:41 **4** It seems like Column 1 is saying, Prior system you would  
 10:40:44 **5** click on something and it would take you to a page in which  
 10:40:46 **6** you had to type in a lot of info.  
 10:40:48 **7** Here, we're utilizing a system where you click  
 10:40:51 **8** on something, and a custom text message is generated  
 10:40:54 **9** vis-à-vis certain technology.  
 10:40:56 **10** The other side would say, Well, that's kind of  
 10:41:00 **11** the same things. I think you're saying, No, they're a  
 10:41:04 **12** different thing.  
 10:41:05 **13** How are they different? In what way are they  
 10:41:07 **14** meaningfully different?  
 10:41:08 **15** MR. WEINBERG: I guess I'm not sure why they  
 10:41:09 **16** would be the same thing at all. The do-it-on-the-computer  
 10:41:12 **17** claim just says, I want to take an abstract concept, do it  
 10:41:16 **18** faster by using a computer.  
 10:41:17 **19** But now, these prior art systems also used  
 10:41:21 **20** computers. So, how could this be a do-it-on-a-computer  
 10:41:24 **21** claim? They're all using computers. They're using them in  
 10:41:28 **22** a different way.  
 10:41:28 **23** That's exactly what the 101 inquiry is supposed  
 10:41:31 **24** to be guarding against. It's supposed to say, Look, you can  
 10:41:33 **25** only patent one specific new way, a better mousetrap.

10:41:36 **1** And so, if you could put up our favorite diagram  
 10:41:40 **2** showing -- and just to be clear about what this diagram is,  
 10:41:43 **3** this is not meant to be a place to show exactly every single  
 10:41:47 **4** limitation of all three patents across all embodiments.  
 10:41:50 **5** This is an exemplary embodiment according to the '887  
 10:41:54 **6** patent.  
 10:41:54 **7** And so, to the extent that there's some  
 10:41:57 **8** variances, it's not the point of this technological exhibit.  
 10:42:02 **9** What this is trying to show is that if all we wanted to  
 10:42:05 **10** claim was sending a pre-filled request, then we would just  
 10:42:10 **11** have Number 7, right. At the bottom, that's a custom  
 10:42:13 **12** message that is sending a pre-filled request from.  
 10:42:15 **13** THE COURT: You're saying, We're about a  
 10:42:17 **14** particular way of getting there --  
 10:42:17 **15** MR. WEINBERG: Right.  
 10:42:19 **16** THE COURT: Of making that happen.  
 10:42:20 **17** MR. WEINBERG: Right, right. Yeah.  
 10:42:21 **18** And if you look at Mr. Novikov's slides, by the  
 10:42:23 **19** time you get to Slide Number 2, I think they've already lost  
 10:42:26 **20** that argument. Because even if you just say, Just one of  
 10:42:30 **21** the ways that you get there is by using a deeplink to a text  
 10:42:34 **22** messaging application that creates a pre-filled message.  
 10:42:38 **23** By itself, that is different than the prior art.  
 10:42:43 **24** It can't be disputed at this junction in the proceedings  
 10:42:46 **25** that that's unconventional. We have that in the pleading

10:42:49 **1** over and over. It's unconventional. It results in a  
 10:42:52 **2** specific fact issue.  
 10:42:52 **3** There's no argument that's generic. We have  
 10:42:55 **4** other ways, other prior art systems that don't use the deep  
 10:43:00 **5** links to pre-fill the requests. And, therefore, it's not a  
 10:43:04 **6** generic way to make a subscription request. And so, because  
 10:43:09 **7** even just that one limitation standing on its own is  
 10:43:12 **8** non-generic, non-conventional, I think we pass the  
 10:43:16 **9** specificity of right test.  
 10:43:17 **10** THE COURT: Just looking at your slide here, I  
 10:43:19 **11** don't think you're disputing that integration tags were  
 10:43:21 **12** known at the time, or that websites were known at the time  
 10:43:24 **13** or that the concept of transferring back user data from one  
 10:43:29 **14** place to another was not known.  
 10:43:32 **15** What I wonder, though, you know, Mr. Martintelli  
 10:43:34 **16** says, embedding integration tags into a web page such that  
 10:43:38 **17** when a user accesses the web page, user data is then sent  
 10:43:41 **18** back to the server, he says that was known. That's like  
 10:43:44 **19** using cookies in a website, and the record is clear that  
 10:43:46 **20** that was all known.  
 10:43:47 **21** Do you agree?  
 10:43:48 **22** MR. WEINBERG: I don't know. That's a fact  
 10:43:51 **23** issue about whether or not that was conventional. But  
 10:43:54 **24** the --  
 10:43:55 **25** THE COURT: You think there's at least a fact

10:43:58 **1** issue. It's not clear that it is. You think it's a  
 10:44:00 **2** disputed question.  
 10:44:02 **3** MR. WEINBERG: Well, standing here, I don't  
 10:44:03 **4** know. I can't say that, but I will say that our briefing  
 10:44:05 **5** did not rely on the non-conventionality of any one piece in  
 10:44:09 **6** isolation.  
 10:44:10 **7** THE COURT: Right, but I'm adding pieces  
 10:44:12 **8** together. I'm adding pieces one, two and three together,  
 10:44:15 **9** right.  
 10:44:15 **10** So, I'm saying: Were integration tags known?  
 10:44:18 **11** Yes. I don't think you're disagreeing.  
 10:44:20 **12** Now, I'm kind of adding together the taking of  
 10:44:23 **13** the integration tags, embedding it into a web page and then  
 10:44:26 **14** having user data that relates to that integration tag be  
 10:44:30 **15** sent back to a server when someone accesses the web page.  
 10:44:32 **16** So, I'm putting together steps one through three, and I'm  
 10:44:35 **17** asking: Was the combination of those steps known? I think  
 10:44:37 **18** you're saying, I don't know. Maybe not. It's not clear in  
 10:44:40 **19** the record that it was.  
 10:44:41 **20** MR. WEINBERG: It's not clear -- perhaps it was,  
 10:44:43 **21** perhaps it wasn't. But the idea of doing that, so why do  
 10:44:46 **22** you have that step here, for example? If your browser is an  
 10:44:52 **23** IOS browser versus an Android browser, you're going to have  
 10:44:55 **24** to have a different kind of custom deeplink. So, some of  
 10:44:58 **25** the information that gets passed along might be: What kind

10:45:01 **1** of phone do you have? Right.  
 10:45:02 **2** So, this is some data that comes back across in  
 10:45:06 **3** order to create that custom URI.  
 10:45:07 **4** THE COURT: Is the point of sending user data  
 10:45:10 **5** back to the server because we may use that user data in that  
 10:45:13 **6** custom-generated text message? Is that part of the point of  
 10:45:16 **7** it?  
 10:45:17 **8** MR. WEINBERG: I believe so, yes.  
 10:45:18 **9** THE COURT: And we're not required to use that  
 10:45:21 **10** user data, right, because we could also use information  
 10:45:23 **11** about the particular web page, at least per Claim 1 of the  
 10:45:26 **12** '887; right?  
 10:45:28 **13** But wouldn't you when you generate the custom  
 10:45:29 **14** text message?  
 10:45:30 **15** MR. WEINBERG: I don't want to get into claim  
 10:45:32 **16** construction, but the phrase user data is defined in the  
 10:45:35 **17** specification to include perhaps specifically referring to  
 10:45:38 **18** the web page and things like that. That will get deep into  
 10:45:41 **19** claim construction. But, yeah, part of it --  
 10:45:43 **20** THE COURT: Well, I'm just talking about like if  
 10:45:45 **21** we're using Claim 1 of the '887 as a representative claim, I  
 10:45:48 **22** think, isn't the claims requirement that the message body  
 10:45:56 **23** includes an identifier associated with at least one of the  
 10:46:00 **24** web page or the user data; right?  
 10:46:03 **25** MR. WEINBERG: Yeah.

10:46:03 **1** THE COURT: You don't have to use the user data  
 10:46:05 **2** in a custom text message. We could use data relating to the  
 10:46:09 **3** website that the user -- actually, it seems like the claims  
 10:46:12 **4** differentiate between those two things; is that right?  
 10:46:14 **5** MR. WEINBERG: Potentially, yes. As I said,  
 10:46:16 **6** this is an embodiment. You couldn't capture both of those  
 10:46:19 **7** necessarily.  
 10:46:20 **8** THE COURT: Sure.  
 10:46:20 **9** MR. WEINBERG: But this is something that once  
 10:46:22 **10** we get past the pleadings -- so, we -- the parties can  
 10:46:25 **11** discuss the claim construction and discuss, as the Court  
 10:46:28 **12** becomes more familiar with this technology, what the claims  
 10:46:30 **13** require and so forth.  
 10:46:32 **14** But the emphasis that we made is that, Look,  
 10:46:35 **15** this entire combination was not known. This is a better  
 10:46:41 **16** mousetrap. Yes, the component pieces, software existed,  
 10:46:45 **17** computers existed, servers existed, but that can't be the  
 10:46:48 **18** test for patent eligible improvements.  
 10:46:51 **19** THE COURT: I think the thing I'm trying to get  
 10:46:53 **20** at with my questions is I definitely understand your point  
 10:46:56 **21** that, like, for example, at step two, this is an ordered  
 10:46:59 **22** combination case. It's not enough simply to look at the  
 10:47:02 **23** case and say, Well, this particular element of the claim was  
 10:47:04 **24** known. This particular element of the claim was known.  
 10:47:07 **25** It's the putting together of all of them by way

10:47:09 **1** of a computer software package that does one, then the next,  
 10:47:13 **2** then the next, then the next. That was new and different.  
 10:47:16 **3** I think that's a part of your argument. Am I  
 10:47:19 **4** wrong?  
 10:47:19 **5** MR. WEINBERG: That's correct, but it's not  
 10:47:20 **6** limited to step two.  
 10:47:21 **7** THE COURT: No, okay. But for all significant  
 10:47:25 **8** purposes, but now what I'm trying to explore is exactly  
 10:47:28 **9** which of the combination of elements are you saying was  
 10:47:31 **10** unconventional?  
 10:47:33 **11** Like, for example, you could be saying, Look, I  
 10:47:36 **12** give it to you. Step one up there on the screen, that was  
 10:47:39 **13** conventional. Step two is conventional. Step three was  
 10:47:42 **14** conventional. And even putting together steps one, two and  
 10:47:46 **15** three was conventional. And then step four was  
 10:47:48 **16** conventional, and steps five, six and seven. And even  
 10:47:51 **17** putting five, six and seven together was conventional.  
 10:47:51 **18** But you know what wasn't conventional? Putting  
 10:47:56 **19** together one, two, three, four, five, six and seven all  
 10:47:56 **20** together. You could be saying that.  
 10:47:57 **21** Or you could be saying, No no, no. Look, yes,  
 10:47:59 **22** putting together all those steps, that was unconventional.  
 10:48:02 **23** But independently, it was unconventional to do one, two and  
 10:48:05 **24** three together. It was unconventional to do four, five, six  
 10:48:07 **25** and seven together. And it was surely unconventional to put

10:48:10 **1** them all together.  
 10:48:11 **2** You could be making different arguments about  
 10:48:13 **3** exactly which combinations are unconventional use of  
 10:48:18 **4** computer technology to solve a computerized problem. I'm  
 10:48:20 **5** just trying to figure out which one you're saying or which  
 10:48:23 **6** argument you're making.  
 10:48:23 **7** Do you know what I mean?  
 10:48:25 **8** MR. WEINBERG: Yeah, I understand. I think the  
 10:48:26 **9** problem, the reason I keep coming back to the full  
 10:48:28 **10** combination is simply because that's the easiest thing for  
 10:48:31 **11** me to prove, and it will be sufficient to get past this  
 10:48:33 **12** motion. So, that's why I seem to be hedging a little bit on  
 10:48:39 **13** saying that specific pieces of it might be unconventional.  
 10:48:42 **14** THE COURT: Okay.  
 10:48:42 **15** MR. WEINBERG: Certainly, I would point to the  
 10:48:44 **16** end there, as Mr. Novikov's slide identified it, using a  
 10:48:48 **17** deeplink to create a custom text message whereby the user  
 10:48:53 **18** can subscribe with one click was unconventional. That's key  
 10:49:00 **19** to all of the claims across the patents. They all have that  
 10:49:04 **20** limitation. And that by itself was not a conventional use  
 10:49:09 **21** of deeplinking technology. Deeplinks existed, just they  
 10:49:13 **22** were not used this way to create sign-ups.  
 10:49:15 **23** THE COURT: What way weren't they used?  
 10:49:16 **24** Deeplinks were used, meaning the concept of transitioning  
 10:49:19 **25** from one application to another --

10:49:21 **1** MR. WEINBERG: Yeah.  
 10:49:22 **2** THE COURT: -- even on a mobile messaging  
 10:49:23 **3** application, that was known and used, but what wasn't used  
 10:49:26 **4** was? How would you frame it?  
 10:49:28 **5** MR. WEINBERG: Let me step back one second.  
 10:49:32 **6** THE COURT: Sure.  
 10:49:33 **7** MR. WEINBERG: A deeplink, typically you would  
 10:49:34 **8** have seen it -- you go to a web page, for example, your  
 10:49:37 **9** banking site's web page. And it says, you know, it would be  
 10:49:40 **10** better if you used the application.  
 10:49:41 **11** So, you have a little link at the top. You  
 10:49:43 **12** click on it and it opens up your application, the mobile  
 10:49:46 **13** app. That's a deeplink. So, that's a general technology  
 10:49:49 **14** like the Internet or --  
 10:49:53 **15** THE COURT: Right.  
 10:49:54 **16** MR. WEINBERG: The idea of having a deeplink  
 10:49:56 **17** that was given to you by this tech server that will open up  
 10:50:01 **18** a text messaging application, pre-address it and pre-fill in  
 10:50:05 **19** the information needed to subscribe to something, and then  
 10:50:11 **20** you were to subscribe by sending it, that use of deeplinking  
 10:50:16 **21** technology was not conventional.  
 10:50:18 **22** THE COURT: It seems like there you're talking  
 10:50:20 **23** about three things together: Deeplinking technology, to  
 10:50:22 **24** generate a text message and that the text message had custom  
 10:50:26 **25** data in it, data that's particularly associated with your

10:50:31 **1** user or perhaps the website that the user was looking for.  
 10:50:33 **2** It's those three pieces that together were not  
 10:50:36 **3** known and being done?  
 10:50:36 **4** MR. WEINBERG: Can I clarify that third piece  
 10:50:39 **5** just a little bit? I would say that the text message is  
 10:50:43 **6** sendable to subscribe to a service.  
 10:50:45 **7** THE COURT: Okay. So, the use of deeplinking to  
 10:50:48 **8** get to a tech message that was sendable to subscribe a  
 10:50:53 **9** service, that was unconventional?  
 10:50:54 **10** MR. WEINBERG: Right. That was unconventional  
 10:50:56 **11** and it's not generic. So, I want to make sure that when I  
 10:51:01 **12** use the terms generic and conventional, I'm maybe using them  
 10:51:04 **13** in a slightly different way than my colleagues here are.  
 10:51:07 **14** When I say generic, I mean inherent, common to  
 10:51:10 **15** the genus, right. Every solution has this limitation  
 10:51:15 **16** because it's generic.  
 10:51:15 **17** THE COURT: Every computer can collect data.  
 10:51:17 **18** Every computer can process data. Every computer can send  
 10:51:20 **19** data.  
 10:51:20 **20** MR. WEINBERG: Right.  
 10:51:21 **21** THE COURT: That would be the kind of generic  
 10:51:22 **22** use of the user technology that the Federal Circuit says,  
 10:51:26 **23** I'm not going to add.  
 10:51:27 **24** MR. WEINBERG: The *Customedia* that they cited in  
 10:51:31 **25** their last brief, in order to get information down from one



10:51:32 **1** computer to another computer, you'll need two computers, a  
 10:51:34 **2** sending computer, and a receiving computer. So, and those  
 10:51:38 **3** are generic limitations.  
 10:51:39 **4** THE COURT: So, I did want to, since you  
 10:51:40 **5** mentioned it, one of my questions was about *Customedia*.  
 10:51:43 **6** What is the cleanest, easiest to understand way to  
 10:51:47 **7** distinguish the decision there from what's going on here?  
 10:51:50 **8** MR. WEINBERG: *Customedia* was a very easy  
 10:51:53 **9** decision, I think, because the claims there were directed to  
 10:51:58 **10** sending advertisements to a user, right. I think the  
 10:52:02 **11** Federal Circuit said directed to the idea of using a  
 10:52:08 **12** computer to deliver targeted advertisements to a user.  
 10:52:13 **13** THE COURT: Well, the Plaintiff there has  
 10:52:14 **14** suggested that the claim's add of having a particular  
 10:52:18 **15** section of the receiving, I think it was the server, devoted  
 10:52:22 **16** to only advertising data was kind of the extra piece that  
 10:52:26 **17** was relevant. The Federal Circuit said, No, that wasn't  
 10:52:30 **18** enough.  
 10:52:31 **19** MR. WEINBERG: Yeah, that was a step two. They  
 10:52:33 **20** didn't address it too much. They touched on step two.  
 10:52:36 **21** But at step one, the reason why this was an easy  
 10:52:38 **22** decision is because the idea of the delivering  
 10:52:43 **23** advertisements. And what did they add? They added a  
 10:52:45 **24** sending computer and a receiving computer.  
 10:52:48 **25** And so, those are generic limitations, but

10:52:50 **1** they're both required in order to computerize the idea of  
 10:52:53 **2** sending advertising data. And there was nothing else.  
 10:52:56 **3** And so, it's our position that when you're doing  
 10:52:59 **4** this analysis, it's okay to weed out generic limitations  
 10:53:02 **5** because generic limitations simply spell out the abstract  
 10:53:06 **6** idea. And that's all there was in *Customedia*.  
 10:53:08 **7** There was a bit of additional dicta in  
 10:53:14 **8** *Customedia* about user experience and stuff that was cited in  
 10:53:19 **9** the letter brief. And then there was the step two inventive  
 10:53:23 **10** concepts raised by the patentee there which said, We store a  
 10:53:27 **11** dedicated area. And I don't think the Federal Circuit said  
 10:53:30 **12** much about that other than it's not inventive. They didn't  
 10:53:34 **13** really explain why. I think it's only one paragraph.  
 10:53:37 **14** THE COURT: Step two is definitely shorter than  
 10:53:39 **15** Paragraph 1. I thought maybe that concept of dedicated  
 10:53:42 **16** storage was addressed in both steps.  
 10:53:45 **17** But, I mean, is a difference that -- I mean, one  
 10:53:50 **18** of the pieces that, you know, we look to -- the Federal  
 10:53:53 **19** Circuit looks to is: What does the patent say about whether  
 10:53:59 **20** or not the addition, the limitation in question, really was  
 10:54:05 **21** an unconventional, a step forward? Is there a difference in  
 10:54:08 **22** the patents that way?  
 10:54:08 **23** MR. WEINBERG: Yeah. So, I'll get back to your  
 10:54:10 **24** question then.  
 10:54:11 **25** The conclusion, the analysis the District Court

10:54:16 **1** provided for *Customedia* is that you only had generic  
 10:54:18 **2** limitations. You did the same analysis here. Again, we're  
 10:54:21 **3** asking: Are these only generic limitations or are they  
 10:54:24 **4** conventional limitations?  
 10:54:25 **5** We conclude on the pleadings that these are  
 10:54:29 **6** unconventional. We conclude just by looking at them and on  
 10:54:32 **7** the pleadings, because there are other alternative systems.  
 10:54:35 **8** This is not generic.  
 10:54:37 **9** And so, there's a distinction from how  
 10:54:40 **10** *Customedia* was clearly just a generic limitation.  
 10:54:42 **11** THE COURT: You mentioned the pleadings. You  
 10:54:44 **12** know, and there are a number of paragraphs, I think, in the  
 10:54:46 **13** pleadings where they attempt to address the issue of  
 10:54:49 **14** unconventionality.  
 10:54:49 **15** Now, I think you'd agree if you had ten  
 10:54:51 **16** paragraphs in the Complaint, but every one of them said the  
 10:54:53 **17** following: The claims amount to the unconventional use of  
 10:54:56 **18** computer technology to solve a problem in the computer  
 10:54:59 **19** process, and then the next paragraph said the same thing,  
 10:55:02 **20** and the next paragraph said the same thing, the other side  
 10:55:04 **21** would say, and they'd be right, that those are conclusory  
 10:55:07 **22** assertions.  
 10:55:08 **23** You can't simply say "X" is unconventional. You  
 10:55:11 **24** would have to say something more like, invoke facts, like  
 10:55:15 **25** "X", the use of "X", the computer will, obviously, do this

10:55:18 **1** as unconventional, for example, or let me explain why.  
 10:55:21 **2** Because, see, what computers were doing at the time was A, B  
 10:55:24 **3** and C. What they weren't doing, what it was difficult to do  
 10:55:27 **4** was, you know, C, D, E and F. And here's how the patent is  
 10:55:32 **5** when the inventors did that.  
 10:55:33 **6** If I'm looking in your Complaint, what's the  
 10:55:35 **7** best place where you'd say, This isn't just a conclusory  
 10:55:38 **8** statement about unconventionality, this is actual specific  
 10:55:41 **9** factual allegations that make it plausible that this was the  
 10:55:45 **10** unconventional use of computers? What's the best place to  
 10:55:48 **11** look to?  
 10:55:48 **12** MR. WEINBERG: So, absolutely. I think that the  
 10:55:51 **13** legal standard is plausible. So, it's conclusory and it's  
 10:55:55 **14** not plausible, then that might be an issue. But we're  
 10:55:58 **15** looking at: We gave this conclusion. Is it plausible?  
 10:56:01 **16** I would just say that Paragraphs 36 and 37 of  
 10:56:04 **17** the Complaint discuss shortcomings of the way the systems  
 10:56:08 **18** were being done, systems were being implemented at the time.  
 10:56:12 **19** And by saying that, at the time there was this website  
 10:56:19 **20** methodology, there was a vendor application methodology, and  
 10:56:23 **21** that caused typos. I think the implication there is that by  
 10:56:27 **22** providing a system where that was not the website  
 10:56:30 **23** methodology, that did not involve causing typos to occur,  
 10:56:36 **24** and that was less burdensome is unconventional.  
 10:56:39 **25** I would also encourage the Court to also



10:56:44 **1** consider the articles that we referenced in the Complaint  
 10:56:47 **2** for Postscript. There's four articles at Footnotes 4, 5 and  
 10:56:52 **3** 6. The article at Footnote 4 calls the system novel, and  
 10:56:58 **4** that's verification on a fact issue from the pleadings.  
 10:57:03 **5** And the article at Footnote 5 calls a key  
 10:57:09 **6** differentiator.  
 10:57:10 **7** Footnote 6 includes a line, this idea of this  
 10:57:13 **8** streamlined process sounds simple, but took months for  
 10:57:17 **9** engineers to develop. And so, that third-party verification  
 10:57:22 **10** is part of the Complaint, part of the pleadings, and that  
 10:57:26 **11** suggests that what we're saying here is absolutely true.  
 10:57:29 **12** THE COURT: I think, you know, sometimes when  
 10:57:31 **13** we're asked to look at allegations that something was novel  
 10:57:34 **14** or a differentiator, you know, obviously, there's a  
 10:57:36 **15** difference between novelty and eligibility that the lines  
 10:57:39 **16** get blurred sometimes. But I think, at a minimum, one would  
 10:57:43 **17** have to make it clear enough that the reference to novelty  
 10:57:48 **18** by an accomplisher is really a reference to the different or  
 10:57:53 **19** unconventional ways that computer software was being used to  
 10:57:56 **20** solve a problem. That's why it's done.  
 10:57:59 **21** So, novelty, as it gets to relevant  
 10:58:03 **22** particularity or specificity in the 101 context, is  
 10:58:08 **23** relevant. Novelty in terms of this is a new, abstract idea  
 10:58:11 **24** isn't.  
 10:58:11 **25** And I guess the question, like, I think your

10:58:14 **1** cite in Paragraph 51 of the Complaint is: How do I know  
 10:58:15 **2** what's being talked about there? You know, what kind of  
 10:58:18 **3** novelty? In what way were they saying it's novel?  
 10:58:21 **4** MR. WEINBERG: Well, the articles do describe  
 10:58:24 **5** the entire two-tap system, and they say -- they go through  
 10:58:27 **6** how this is an improvement. You see that in, for example,  
 10:58:30 **7** the article at Footnote 4 at Page 1. It says it allows  
 10:58:33 **8** brands to lay out the shortest possible path to sign up.  
 10:58:36 **9** It's talking about the two-tap solution.  
 10:58:38 **10** Same thing in Footnote 4 at Page 4, it talks  
 10:58:41 **11** about how its click-through rate is increased by 30 percent.  
 10:58:46 **12** The ROI increased by 25. Tenfold increase in revenue per  
 10:58:46 **13** messaging.  
 10:58:51 **14** And the fact that this was -- these praises come  
 10:58:56 **15** immediately after description of the "two-tap system,"  
 10:59:00 **16** suggests that they, at least plausibly, that's the standard  
 10:59:03 **17** here, are talking about that innovation.  
 10:59:07 **18** THE COURT: Did you talk much in your briefs  
 10:59:08 **19** about the particular content of these articles at length at  
 10:59:13 **20** Footnotes 4, 5 and 6. I know you referenced *Berner* 51  
 10:59:17 **21** sometimes, but did you get into that?  
 10:59:18 **22** MR. WEINBERG: We quoted the articles in the  
 10:59:20 **23** sections discussing conventionality. And I know the other  
 10:59:25 **24** side pushed back quite a bit about novelty not being  
 10:59:28 **25** important here. But novelty is the question when it comes

10:59:31 **1** to conventionality in step two, and that's the question that  
 10:59:35 **2** you just asked about.  
 10:59:36 **3** So, we did quote them, I think, in both briefs,  
 10:59:40 **4** all three articles.  
 10:59:41 **5** THE COURT: You have a couple minutes left,  
 10:59:42 **6** Mr. Weinberg, about five minutes or so, so let me just let  
 10:59:45 **7** you continue.  
 10:59:47 **8** MR. WEINBERG: All right. If there's a specific  
 10:59:50 **9** question on your mind, I'm more than happy to address it.  
 10:59:53 **10** Otherwise, I'll guess at it with other questions that were  
 10:59:56 **11** asked.  
 10:59:56 **12** THE COURT: No. I mean, I have a few questions  
 10:59:58 **13** left, but I want to make sure that you get a chance to make  
 11:00:03 **14** the points you wish before you sit down. If there's  
 11:00:06 **15** anything further you want to add, any other followup to  
 11:00:09 **16** questions you wish to add?  
 11:00:11 **17** MR. WEINBERG: Maybe the last item I'd like to  
 11:00:13 **18** make clear is that you see this argument a few times that  
 11:00:19 **19** the invention, the specific implementation of the invention  
 11:00:22 **20** is abstract and because it is an embodiment of the  
 11:00:27 **21** higher-level abstract idea. And that's backwards, right.  
 11:00:32 **22** Every implementation is going to go through the  
 11:00:35 **23** steps required to implement the higher-level abstract idea.  
 11:00:40 **24** They have to show the opposite, that our specific limitation  
 11:00:44 **25** essentially preempts or, I don't want to use the word

11:00:47 **1** preempt, but essentially tries to claim the whole abstract  
 11:00:51 **2** idea and adds only generic conventional and field of use  
 11:00:54 **3** limitations. And so, the proof is backwards. I just wanted  
 11:00:57 **4** to point that out.  
 11:00:58 **5** THE COURT: You mentioned preemption. Maybe  
 11:01:00 **6** that's the last question I have which is, you know, that's  
 11:01:02 **7** the concern that drives the 101 inquiry.  
 11:01:07 **8** The other side has said that these claims are  
 11:01:09 **9** directed simply to streamlining a process for a customer to  
 11:01:12 **10** enroll in a marketing promotion by providing a pre-filled  
 11:01:15 **11** and pre-addressed request. So, that's the idea assertedly  
 11:01:20 **12** at issue. We're going to streamline the process for  
 11:01:22 **13** somebody enrolling in a marketing promotion by way of a  
 11:01:25 **14** pre-filled and pre-addressed request.  
 11:01:26 **15** So, the way I think about it is, maybe this is  
 11:01:30 **16** right or wrong, there must be lots of ways in the world that  
 11:01:33 **17** one could do something, patent something that relates to  
 11:01:38 **18** that idea. Lots of ways to try to streamline the process  
 11:01:41 **19** for enrolling in a promotion where you use a pre-filled or  
 11:01:44 **20** pre-addressed request.  
 11:01:45 **21** I wonder how much of that whole that a  
 11:01:50 **22** representative claim here takes up. And I think if it could  
 11:01:53 **23** be shown that there's at least a question that the  
 11:01:56 **24** representative claim takes up not an undue amount of that  
 11:02:01 **25** whole, that might be very helpful for a patentee.

11:02:04 **1** On the other hand, if it seemed like the  
 11:02:06 **2** representative claim and what it covered takes up quite a  
 11:02:09 **3** lot or nearly all of that whole, maybe a portion is for the  
 11:02:15 **4** patentee. I guess, my question is: Based on what's in the  
 11:02:19 **5** record from a preemption perspective, what could I glean  
 11:02:23 **6** from how much of the whole a claim like Claim 1 of the '887,  
 11:02:27 **7** might be said to take up and how much it doesn't? Do you  
 11:02:30 **8** know what I'm saying?  
 11:02:31 **9** MR. WEINBERG: Yeah, a lot to unpack there. I  
 11:02:33 **10** would say preliminarily the Federal Circuit has held many  
 11:02:38 **11** times that a narrow abstraction idea is still an abstract  
 11:02:42 **12** idea.  
 11:02:42 **13** The flip side of that is even if we take a large  
 11:02:44 **14** part of the art, the point of a patent is to monopolize some  
 11:02:49 **15** piece of the art. So, if we're entitled to a larger piece,  
 11:02:53 **16** because that's what's disclosed that that was the  
 11:02:55 **17** improvement, I think that's not necessarily going to be  
 11:03:01 **18** viewed to be ineligibility.  
 11:03:03 **19** The prior art method of accomplishing this same  
 11:03:09 **20** goal, I think, are what I would point to most first and  
 11:03:12 **21** foremost. The two different, the old website approach and  
 11:03:15 **22** the vendor application approach, which have been done and  
 11:03:20 **23** used widely.  
 11:03:21 **24** THE COURT: What you're calling "the vendor  
 11:03:22 **25** application approach," it's described where?

11:03:24 **1** MR. WEINBERG: It's mentioned briefly in the  
 11:03:26 **2** specification, the application at the end of that  
 11:03:30 **3** introduction paragraph.  
 11:03:31 **4** THE COURT: Where is it mentioned? I asked it  
 11:03:36 **5** because my memory of Column 1 is that it was talking about  
 11:03:39 **6** one prior art approach, but I think you're suggesting it  
 11:03:42 **7** references two different ones. And I'm not sure how to  
 11:03:45 **8** distinguish.  
 11:03:52 **9** MR. WEINBERG: So, for example, redirected to  
 11:03:54 **10** the vendor's application or website, I think it's probably  
 11:03:57 **11** what I'm referring to at Line 43. But probably the best  
 11:04:02 **12** discussion of it is in the Complaint and in the articles  
 11:04:06 **13** that talk extensively about the vendor applications.  
 11:04:10 **14** THE COURT: Which maybe before we -- I'll ask  
 11:04:14 **15** you when the other side is done with their rebuttal if  
 11:04:18 **16** there's a particular part of the Complaint that you would  
 11:04:21 **17** say makes reference to a different prior art strategy other  
 11:04:25 **18** than the one being described in Column 1.  
 11:04:27 **19** MR. WEINBERG: Yeah.  
 11:04:28 **20** THE COURT: Here's where we talk about it,  
 11:04:31 **21** Column 1. If you have it now, let me know. But if not --  
 11:04:33 **22** MR. WEINBERG: Well, the articles are part of  
 11:04:34 **23** the Complaint.  
 11:04:35 **24** THE COURT: I think the problem, though, is I  
 11:04:37 **25** think you're relying fairly heavily today on the particular

11:04:39 **1** content, particular articles that are footnoted in the  
 11:04:43 **2** Complaint. And maybe you did, but I read the briefs very  
 11:04:48 **3** carefully. I'm not sure that I appreciated the particular  
 11:04:51 **4** substance of a particular article footnoted in the Complaint  
 11:04:55 **5** and why it was discussing a certain prior art strategy for  
 11:04:58 **6** using computer functionality that's different from what's  
 11:05:00 **7** described in Column 1, for example. So, I want to make sure  
 11:05:03 **8** I understand that.  
 11:05:03 **9** MR. WEINBERG: So, are you talking about the  
 11:05:05 **10** vendor application approach or the website approach?  
 11:05:09 **11** THE COURT: Well, to be honest, I'm not sure I  
 11:05:11 **12** understand the distinction. In other words, when I look at  
 11:05:13 **13** Column 1, I understand that that's the best place in the  
 11:05:16 **14** patent where the patentee is telling me, Here's what the  
 11:05:19 **15** prior art was doing. Here's why it had some downsides.  
 11:05:22 **16** Here's what we're going to do different.  
 11:05:24 **17** And it talks about known methods allowing a user  
 11:05:27 **18** to open a vendor's application or website. And it goes on  
 11:05:31 **19** to say that what happens is then you open that application  
 11:05:37 **20** or website and you provide payment information via the  
 11:05:41 **21** application or website to complete a transaction.  
 11:05:44 **22** But that approach has a downside because you  
 11:05:48 **23** have to pause your prior activities maybe on a mobile device  
 11:05:52 **24** and then you're redirected to the vendor's application or  
 11:05:54 **25** website. So, you're on your mobile device, then you get

11:05:58 **1** redirected to this separate page, you know, et cetera. And  
 11:06:00 **2** that's tough because you lose focus. And maybe it's also  
 11:06:03 **3** tough because you've got to type in a lot of info, and you  
 11:06:05 **4** get distracted, or you might mistype stuff.  
 11:06:08 **5** That's a prior art approach using computers that  
 11:06:10 **6** has some downsides. We're going to fix them. I'm looking  
 11:06:14 **7** at it as like one approach. It's talked about at Column 1.  
 11:06:18 **8** I think you're telling me there's two different  
 11:06:20 **9** approaches that we think are pretty relevant to the  
 11:06:22 **10** Complaint, that one and another one. And I'm saying,  
 11:06:25 **11** Where's that other one?  
 11:06:25 **12** Do you know what I'm asking?  
 11:06:26 **13** MR. WEINBERG: Yeah, yeah. Certainly, I would  
 11:06:28 **14** say Column 1 is not a hundred percent clear and with two  
 11:06:32 **15** different approaches. It becomes a little more clear when  
 11:06:34 **16** you read down the rest of the Complaint in those articles  
 11:06:37 **17** which have extensive discussion of vendor application being  
 11:06:41 **18** another approach.  
 11:06:42 **19** But either way, even if the Court were to find  
 11:06:44 **20** that this vendor application was not specifically or  
 11:06:46 **21** sufficiently articulated, it still -- the one prior art  
 11:06:52 **22** approach, the website approach where you're filling in your  
 11:06:54 **23** phone number is still --  
 11:06:55 **24** THE COURT: Are you distinguishing -- are you  
 11:06:57 **25** saying two because you're distinguishing between a reference

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11:07:00 **1** to a vendor application versus a vendor website?

11:07:02 **2** MR. WEINBERG: Yes.

11:07:02 **3** THE COURT: Okay.

11:07:03 **4** MR. WEINBERG: So, each of those -- those are

11:07:04 **5** two different approaches, and they generated different

11:07:08 **6** problems?

11:07:08 **7** MR. WEINBERG: Well, so a vendor application

11:07:12 **8** would be you go to a website, and you go to an app store,

11:07:15 **9** and you download an application for your bank, and you

11:07:17 **10** create an account. And you -- it does have its own

11:07:21 **11** burdensome problems. It works differently than going to a

11:07:23 **12** website, filling in your phone number, receiving a text

11:07:26 **13** message, replying yes to it. Those are two different kinds

11:07:30 **14** of systems.

11:07:31 **15** THE COURT: Are they different in a material way

11:07:32 **16** for our purposes here?

11:07:33 **17** MR. WEINBERG: Well, only in that they are two

11:07:36 **18** different ways from each other and from the claimed method

11:07:39 **19** of accomplishing the same desired goal of enrolling

11:07:43 **20** customers.

11:07:44 **21** THE COURT: Got it. Okay.

11:07:45 **22** MR. WEINBERG: And --

11:07:46 **23** THE COURT: Sorry. You're out of time. Let me

11:07:49 **24** stop you there because I do want to -- is there anything,

11:07:51 **25** very briefly, that you want to add before you end?

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11:07:54 **1** MR. WEINBERG: Yeah. I just wanted to, before I

11:07:56 **2** sat down, to make the point that I think that the two

11:07:58 **3** different ways in which the Defendants are describing the

11:08:01 **4** abstract idea of streamlining the sign-up process is one.

11:08:06 **5** And streamlining the sign-up process using pre-filled

11:08:10 **6** requests is really the same. Because in this context when

11:08:14 **7** you're making a request, the only way to streamline it is to

11:08:18 **8** ask less of the user.

11:08:19 **9** So, that's just kind of a play on words.

11:08:22 **10** They're both talking about the goal of the invention and not

11:08:25 **11** about what the invention is directed to.

11:08:27 **12** THE COURT: Okay. All right. Thank you.

11:08:29 **13** MR. WEINBERG: Thank you.

11:08:29 **14** THE COURT: All right. Let me give

11:08:32 **15** Plaintiff's -- sorry, Defendant's counsel five minutes more.

11:08:34 **16** MR. NOVIKOV: I'm going to try to keep it under

11:08:37 **17** five minutes, if I can. I, too, was wondering, as I was

11:08:47 **18** reading the Plaintiff's briefs, what it was they were

11:08:56 **19** asserting was unconventional about the arrangement as are

11:08:59 **20** cited in the claims.

11:09:00 **21** And I was glad to hear Mr. Weinberg articulate

11:09:04 **22** it. And what he said, and I tried to write it down, was

11:09:07 **23** using a deeplink to create a custom text message that a user

11:09:10 **24** can use to subscribe to a service.

11:09:13 **25** That can't possibly be it. The notion of using

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11:09:19 **1** a deeplink to create a custom text message is in the record.

11:09:24 **2** That was known. Being able to pre-populate an SMS message

11:09:29 **3** was something specific as part of that standardized thing

11:09:32 **4** that they're making use of.

11:09:33 **5** THE COURT: So, I think you're saying custom

11:09:36 **6** text messages generated by a deeplink was known. How do you

11:09:44 **7** know that? Look at the Other Publications portion of the

11:09:49 **8** patent. Look at these words I've highlighted.

11:09:55 **9** I do see the words, and I at least see they say

11:09:58 **10** how to pre-populate an SMS message. I don't really know

11:10:02 **11** that these tell me that deeplink-generated text messages

11:10:07 **12** with custom user data was conventional.

11:10:10 **13** Do they tell me that?

11:10:11 **14** MR. NOVIKOV: Sure. I don't know whether --

11:10:14 **15** certainly, these words do not tell you that the text message

11:10:20 **16** that is populated has custom user data.

11:10:23 **17** I would point Your Honor to the *Secured Mail*

11:10:26 **18** case that's cited all over both sides' briefing that says in

11:10:30 **19** 2001, a personalized URL, which is what that would be, was

11:10:36 **20** perfectly generic and conventional.

11:10:38 **21** THE COURT: And I know, obviously, that

11:10:40 **22** Defendants are handicapped at this 101 stage because one can

11:10:43 **23** only rely on the record, and the record really is the

11:10:46 **24** Complaint and exhibits attached thereto, et cetera.

11:10:48 **25** But I also wonder if, like, that's part of the

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11:10:50 **1** point like it might be true that you can show me pretty

11:10:53 **2** clearly, if you have an expert declaration you could append

11:10:56 **3** to a summary judgment motion, Hey, look, it's totally

11:10:59 **4** conventional.

11:11:00 **5** But that's not what we're doing at the Rule 12

11:11:03 **6** stage. I wonder, you know, how come maybe that's not what's

11:11:05 **7** going on here.

11:11:06 **8** MR. NOVIKOV: I totally understand the concern

11:11:09 **9** that, you know, you've got these three pieces. You have

11:11:12 **10** user data coming back, you've got a deeplink supposedly

11:11:15 **11** based on that, and you have the SMS being used to subscribe

11:11:20 **12** somebody.

11:11:20 **13** I totally understand the Court's concern that

11:11:22 **14** there's nothing in the record that one can point to and say,

11:11:25 **15** Ah-hah, that was conventional. And I appreciate that we're

11:11:28 **16** asking the Court to make a little bit of a leap.

11:11:32 **17** But I would just say the Court asked

11:11:33 **18** Mr. Weinberg, in 2017, was it known and conventional to have

11:11:37 **19** a web page that uses a cookie to send back user data? And

11:11:41 **20** Mr. Weinberg said, I don't know it's a fact issue.

11:11:44 **21** And I understand why he took that position. I'm

11:11:46 **22** not faulting him in any way, but I would just say that that

11:11:50 **23** is the sort of assertion that the Court does not have to

11:11:54 **24** accept as raising a plausible fact issue.

11:11:57 **25** THE COURT: Do you think the record makes it

11:11:59 **1** clear that his assertion, that it could be a fact issue, is  
 11:12:03 **2** incorrect? Does the record clearly show me that utilizing  
 11:12:10 **3** integration tags and or a Third Circuit equivalent cookies  
 11:12:16 **4** and a website that are then sent back to the server when one  
 11:12:22 **5** accesses it was well known at the time?  
 11:12:23 **6** MR. NOVIKOV: I think -- absolutely. I mean, I  
 11:12:25 **7** think the patent discusses the notion of sending of cookies,  
 11:12:29 **8** which are things that are sent back from a web page to a  
 11:12:32 **9** server. It doesn't explain what they are. Doesn't claim to  
 11:12:35 **10** invent them.  
 11:12:35 **11** I think the Court might look at the *Bridge and*  
 11:12:39 **12** *Post* case, which is also cited in the briefing, which has a  
 11:12:42 **13** really nice discussion of how using a combination of  
 11:12:48 **14** perfectly conventional things where there's nothing about  
 11:12:51 **15** the claims or the specification that suggests that there's  
 11:12:55 **16** anything new going on in that technical combination is an  
 11:12:59 **17** inference that the Court can draw.  
 11:13:01 **18** THE COURT: Mr. Novikov, you're almost at the  
 11:13:03 **19** end. If you want to make one last point.  
 11:13:05 **20** MR. NOVIKOV: The only point that I would make  
 11:13:07 **21** is the Court sort of issued what I took to be a friendly  
 11:13:11 **22** implicit challenge to Mr. Weinberg to explain how these  
 11:13:17 **23** claims leave any room to use deeplinking to subscribe people  
 11:13:22 **24** to promotions on the Internet. And the answer came back  
 11:13:27 **25** sort of inconclusive.

11:13:28 **1** And I, too, think that if you look at these  
 11:13:31 **2** claims, you will find that it does occupy that field. And  
 11:13:36 **3** while that's not dispositive, I think it is something the  
 11:13:38 **4** Court should consider.  
 11:13:39 **5** THE COURT: Okay. Thank you, Mr. Novikov. And  
 11:13:43 **6** thanks to counsel for both sides for their arguments.  
 11:13:47 **7** We'll transition to our second argument. But  
 11:13:50 **8** because we've got some moving pieces here to move around,  
 11:13:54 **9** why don't I take a short five-minute break to let everybody  
 11:13:57 **10** stretch their legs, accomplish that and use the restroom if  
 11:13:59 **11** you need to.  
 11:14:00 **12** So, the Court will be in recess. We'll come  
 11:14:04 **13** back, say, around 11:20.  
 11:14:06 **14** Okay. Thank you.  
 11:14:06 **15** DEPUTY CLERK: All rise.  
 11:24:58 **16** (A brief recess was taken.)  
 11:24:58 **17** THE COURT: Please be seated. All right.  
 11:25:03 **18** Now, we'll turn to our third case, but our  
 11:25:06 **19** second set of cases, which is case one, the BT case. Again,  
 11:25:15 **20** it's the Defendant's Rule 12 motion.  
 11:25:17 **21** So, I will start and turn to counsel for each  
 11:25:24 **22** side. We allocated 20 minutes for argument for each side.  
 11:25:27 **23** Again, I'll let you know, again, when you have about five  
 11:25:29 **24** minutes left.  
 11:25:32 **25** MR. DESAI: Your Honor, we have some printed

11:25:33 **1** copies, if you'd like.  
 11:25:34 **2** THE COURT: Please feel free to hand them up.  
 11:25:34 **3** Thank you.  
 11:25:47 **4** MR. DESAI: Good morning, Your Honor. Anish  
 11:25:47 **5** Desai representing movant, Palo Alto Networks. The  
 11:25:52 **6** improvement in the asserted patents here is not a technical  
 11:25:55 **7** solution. The patents claim a generic computing device  
 11:25:59 **8** called a probe that collects, filters, analyzes and  
 11:26:03 **9** transmits data. The solution is adding a human to analyze  
 11:26:07 **10** data, status data to figure out whether the data is benign  
 11:26:11 **11** or a threat, and then updating the computer based on the  
 11:26:14 **12** human's analysis.  
 11:26:16 **13** This is not a mischaracterization or a  
 11:26:19 **14** oversimplification. That is what is in the claims, and  
 11:26:23 **15** that's how the invention -- the improvement is described in  
 11:26:26 **16** the specification.  
 11:26:27 **17** THE COURT: I guess on that front, I know you  
 11:26:29 **18** said in your briefing, in terms of what the claims are  
 11:26:32 **19** about, the improvements, what makes this kind of a "good  
 11:26:38 **20** invention" from the patentee's perspective as described in  
 11:26:41 **21** the claim, you focus on the human elements, the human SOC.  
 11:26:45 **22** But, I mean, wouldn't it be correct to say that the  
 11:26:49 **23** invention is really about the combination of the  
 11:26:52 **24** computerized elements at the probe, plus the human element  
 11:26:57 **25** at the SOC and adding those two together?

11:27:01 **1** I think the other side would say it's about more  
 11:27:03 **2** than that. But even at a minimum, isn't it about computers  
 11:27:07 **3** plus humans in those ways?  
 11:27:08 **4** MR. DESAI: And that's how we described it in  
 11:27:10 **5** our motion, which is collecting, filtering, analyzing and  
 11:27:13 **6** transmitting data and then making modifications based on the  
 11:27:16 **7** human feedback.  
 11:27:17 **8** THE COURT: I think that's what they call kind  
 11:27:18 **9** of the two-level review process.  
 11:27:21 **10** MR. DESAI: Sure. It's a computer that analyzes  
 11:27:23 **11** data. It doesn't tell you how it analyzes it. It just  
 11:27:27 **12** filters, analyzes to identify security-related events. And  
 11:27:31 **13** then for data that doesn't filter, which let's be honest,  
 11:27:36 **14** it's the good and the bad filter. And if it doesn't hit a  
 11:27:38 **15** good or a bad filter, you send it to the human.  
 11:27:40 **16** THE COURT: "Bad" meaning like the filter will  
 11:27:43 **17** know in advance, this particular type of attack is known.  
 11:27:46 **18** We see it. That's bad. Block it.  
 11:27:49 **19** There will be certain data that is not bad and  
 11:27:51 **20** understood, I guess, to be good that passes. That's the  
 11:27:55 **21** type of initial filtering step you're saying we have?  
 11:27:58 **22** MR. DESAI: Yeah. You can see that in the  
 11:28:00 **23** Complaint, Your Honor, where they talk about the accused  
 11:28:01 **24** product, and they accuse what are called in the Complaint  
 11:28:05 **25** white lists and black lists in the accused products. And

11:28:09 **1** those are terms that, I think, are a little bit out of  
 11:28:12 **2** favor, but they're used in the Complaint.  
 11:28:14 **3** And that's what the filtering is. It's  
 11:28:16 **4** traditional, the good and the bad list.  
 11:28:19 **5** THE COURT: And I think, at a very base level, I  
 11:28:21 **6** think like your side is saying, Judge, the way you should  
 11:28:24 **7** look at the representative claim here -- and just for what  
 11:28:27 **8** it's worth, I've been using the '237 patent just as kind of  
 11:28:30 **9** like, I guess, a guide.  
 11:28:32 **10** MR. DESAI: Yes.  
 11:28:33 **11** THE COURT: I've been using Claim 18, at least  
 11:28:35 **12** if I was using one claim, but I know there's a correlation.  
 11:28:38 **13** I think what your side is saying is, Judge, really, these  
 11:28:42 **14** representative claims, it's as if they said filter data.  
 11:28:48 **15** Then analyze some additional data. Then have a human  
 11:28:53 **16** analyze data. And, you know, that sounds a lot like, you  
 11:28:56 **17** know, ineligible claims, very functional-sounding kind of  
 11:29:00 **18** claims that the Fed Circuit has disclaimed the claims.  
 11:29:05 **19** But the other side, of course, was saying, Well,  
 11:29:07 **20** there's a greater particularity here that matters. And  
 11:29:12 **21** there certainly are a lot of additional words in the claims,  
 11:29:15 **22** right, some of which we'll talk about. I know the  
 11:29:19 **23** Plaintiff, I think, will say might make a difference here.  
 11:29:22 **24** But why, I guess, would you say it's fair to  
 11:29:26 **25** look at the claims in that very kind of basic way as opposed

11:29:29 **1** to what the Plaintiff might say is, Well, look at the  
 11:29:32 **2** particular way in which we're doing some of those things?  
 11:29:35 **3** MR. DESAI: Right. So, we have the claim right  
 11:29:36 **4** up here. We can start with Claim 1 or Claim 18, I don't  
 11:29:39 **5** think it really matters for these functional steps.  
 11:29:42 **6** I mean, collecting status data from a component  
 11:29:44 **7** of the network, right. I don't think there's anything more  
 11:29:47 **8** there than just collecting data. Status data is extremely  
 11:29:51 **9** broad. It's not any particular type of data.  
 11:29:54 **10** And then you're analyzing the status data to  
 11:29:57 **11** identify a security-related event. Look at the data and  
 11:30:00 **12** see: Is it benign or is it a threat? Doesn't tell you how  
 11:30:03 **13** to do it.  
 11:30:04 **14** And then it says the analysis includes  
 11:30:06 **15** filtering. Filtering is a well-known, routine activity.  
 11:30:14 **16** And then when you're done with the filtering,  
 11:30:17 **17** there's stuff that may not be good and may not be bad  
 11:30:20 **18** because the computer doesn't know what to do with it. And  
 11:30:22 **19** the solution that the patent proposes, the distinguishing  
 11:30:27 **20** feature is go to the human, right. And so, we're invoking a  
 11:30:32 **21** human.  
 11:30:32 **22** THE COURT: Well, before we get to the human,  
 11:30:35 **23** you know, there is this kind of two-stage kind of  
 11:30:41 **24** filtering/analysis process that happens at the probe level.  
 11:30:44 **25** There's the initial filter. But then there's the read or

11:30:49 **1** the second stage of analysis that -- the taking this residue  
 11:30:53 **2** data it's called, we're going to have the probe analyze that  
 11:30:57 **3** a second -- anew or take this data and analyze it in a  
 11:31:02 **4** different way.  
 11:31:03 **5** Now, I know you can say, Hey, that's just  
 11:31:07 **6** analyzed data plus filter data. But if there is some  
 11:31:12 **7** evidence, and I'll ask the Plaintiff this, I don't think  
 11:31:17 **8** there's a ton of discussion about this analysis  
 11:31:20 **9** post-filtering data in the patent. But if there's some  
 11:31:22 **10** evidence in the record that might suggest that computers  
 11:31:25 **11** really weren't, in terms of computers working on network  
 11:31:29 **12** security issues, weren't really at the time filtering and  
 11:31:32 **13** then going back and doing a second-level analysis on residue  
 11:31:35 **14** data, that was different and new. Computers weren't working  
 11:31:39 **15** that way.  
 11:31:40 **16** Could that be enough to potentially save the  
 11:31:43 **17** claim here maybe in step two?  
 11:31:44 **18** MR. DESAI: I think -- see, I think what's  
 11:31:46 **19** fundamental about this probe in the claim and how it was  
 11:31:51 **20** described by the Plaintiff itself is that the probe here is  
 11:31:59 **21** narrowing the information that the user will have to review.  
 11:32:05 **22** Okay. And it's doing it using well-known filtering and data  
 11:32:13 **23** discrimination analysis techniques.  
 11:32:14 **24** And the key here is you can see at the bottom of  
 11:32:20 **25** this Slide 5 of the '237 patent, Column 3, Lines 4 to 19,

11:32:29 **1** the purpose of this is to reduce the volume of data that the  
 11:32:31 **2** human has to review. Okay. And we have the *Electric Power*  
 11:32:39 **3** *Systems* case that tells us -- *Electric Power Group*, merely  
 11:32:43 **4** requiring the selection of manipulation of information to  
 11:32:45 **5** provide a humanly comprehensible amount of information  
 11:32:48 **6** useful for users by itself does not transform an otherwise  
 11:32:53 **7** abstract process.  
 11:32:54 **8** And all they're doing with this probe is using  
 11:32:58 **9** well-known analysis to reduce the amount of information for  
 11:33:03 **10** the human to review. And let's be clear, the probe is  
 11:33:07 **11** simply a generic computing device that is automating  
 11:33:11 **12** analysis that a human could otherwise perform.  
 11:33:14 **13** And here's why. BT cannot reasonably dispute  
 11:33:18 **14** that a human can analyze status data to identify a  
 11:33:22 **15** security-related vendor. Okay. That's the essence of the  
 11:33:26 **16** patent, having a human analyze the status data and figuring  
 11:33:30 **17** out benign or a threat.  
 11:33:32 **18** And at Page 11 of their opposition, BT admits  
 11:33:38 **19** that a human can analyze the status data to determine good  
 11:33:42 **20** or bad. So, they said, "The analyst or analyst systems at  
 11:33:46 **21** the SOC are well equipped to determine whether residual  
 11:33:50 **22** status data is benign or constitutes a threat."  
 11:33:53 **23** THE COURT: But I want to focus, again, though,  
 11:33:55 **24** on my question which is really about this concept of a  
 11:33:58 **25** filtering process that doesn't just do a good or bad. It



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11:34:01 **1** does a good or a bad, and it has this kind of middle ground  
 11:34:04 **2** of data that it collects, and then having the probe do an  
 11:34:07 **3** additional level of analysis on that residual data.  
 11:34:12 **4** Now, I think it's the case that other than that  
 11:34:15 **5** part of Column 8 that you've cited here, I don't think that  
 11:34:17 **6** really talks about, otherwise, this additional step of  
 11:34:21 **7** taking a hard look at the post-residue data.  
 11:34:24 **8** Do you agree?  
 11:34:26 **9** MR. DESAI: Well, I think this is right above  
 11:34:27 **10** the highlighted portion.  
 11:34:28 **11** THE COURT: Right. This is part of Column 8.  
 11:34:31 **12** MR. DESAI: This is it.  
 11:34:32 **13** THE COURT: It's not like it talks about it  
 11:34:34 **14** here, and it talks about it in the abstract, and it talks  
 11:34:34 **15** about it in the background section. This is it. This is  
 11:34:37 **16** it.  
 11:34:37 **17** But it's not like it -- but I understand this  
 11:34:39 **18** part of the patent that you've got highlighted to be saying,  
 11:34:42 **19** Look, when we're talking about analysis on residue data, the  
 11:34:46 **20** type of analysis we're doing is a type of data  
 11:34:50 **21** discrimination analysis, a type of analysis that computers  
 11:34:53 **22** do.  
 11:34:54 **23** I don't understand it to be saying that  
 11:34:56 **24** computers were doing this combination of steps, filtering  
 11:35:00 **25** for good and bad, and then analyzing post-residue data after

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11:35:05 **1** that regularly at the time.  
 11:35:08 **2** Does that seem correct?  
 11:35:09 **3** MR. DESAI: Well, I think the principle of the  
 11:35:13 **4** background of the patent tells us that probes were analyzing  
 11:35:17 **5** data to identify good or bad, right. And the point being  
 11:35:21 **6** here is the probe doesn't do anything special in a  
 11:35:26 **7** technological way with this other data other than the claim  
 11:35:30 **8** saying the abstract idea of analyzing it further and then  
 11:35:34 **9** send it to the human.  
 11:35:35 **10** THE COURT: But I guess my question is: How  
 11:35:37 **11** come a filtering process plus an additional level of  
 11:35:42 **12** analysis of a subset of that, you know, either filtered or  
 11:35:49 **13** non-filtered data, whatever you want to call it, how come  
 11:35:51 **14** that can't be the unconventional use of computer technology?  
 11:35:54 **15** Let's put those two known steps together in a way that  
 11:35:57 **16** computers weren't doing at the time.  
 11:35:59 **17** MR. DESAI: I think, Your Honor, the problem  
 11:36:00 **18** there is you have filtering and analysis of data, okay,  
 11:36:03 **19** which are both abstract ideas. Okay. We cannot -- there's,  
 11:36:09 **20** you know, a plethora of Federal Circuit cases that will say  
 11:36:11 **21** that filtering and analysis of data are abstract ideas.  
 11:36:16 **22** Now, the question is: That's what this claim is  
 11:36:20 **23** directed to. Is there something more in the claim that  
 11:36:23 **24** claims beyond those abstract ideas of using a computer as a  
 11:36:27 **25** tool to do these abstract concepts of filter and analyze

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11:36:32 **1** data.  
 11:36:32 **2** THE COURT: Well, we know sometimes the cases  
 11:36:34 **3** turn on whether there's enough of a record telling us that  
 11:36:36 **4** the combination of known steps was, in fact, asserted to be  
 11:36:43 **5** unconventional. Sometimes it seems like even when you have  
 11:36:46 **6** a multi-step claim in a patent that seems like it is  
 11:36:50 **7** basically doing very -- you know, kind of basic-sounding  
 11:36:54 **8** computer-like steps, if the patent or the record tells us  
 11:36:58 **9** enough to say, Hey, that was interesting, and new and  
 11:37:00 **10** different from the way computers were working, sometimes it  
 11:37:03 **11** can be saved.  
 11:37:04 **12** And, I guess, as a lead-in to the other side,  
 11:37:06 **13** they'll say, Look, the best case to analogize this case to  
 11:37:09 **14** is *SR*. And if you look at *SR*, I mean, that claim, the way  
 11:37:13 **15** those monitors were being used, I don't think anyone was  
 11:37:15 **16** asserting that what the monitors were doing at any of those  
 11:37:18 **17** steps was an unusual or different way that computer monitors  
 11:37:23 **18** had been used or worked. It seemed like the Federal Circuit  
 11:37:25 **19** there was just saying, But the combination was said to be  
 11:37:28 **20** unconventional, and the patent said that, and that was  
 11:37:31 **21** enough.  
 11:37:32 **22** So, I guess it's a lead-up to say: How do you  
 11:37:34 **23** distinguish this case from *SR*?  
 11:37:36 **24** MR. DESAI: And before I get to *SR* in one  
 11:37:38 **25** moment --

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11:37:38 **1** THE COURT: Sure.  
 11:37:38 **2** MR. DESAI: -- I think we have to look at the  
 11:37:40 **3** specification and what it describes as the improvement.  
 11:37:44 **4** Okay. And you will not see here that it's -- the  
 11:37:47 **5** improvement is the probe collecting and analyzing the data.  
 11:37:53 **6** The improvement is categorically the human that's being  
 11:37:57 **7** supplemented.  
 11:37:58 **8** THE COURT: I grant you that the patent is, from  
 11:38:01 **9** the Plaintiff's perspective, not great in the sense that it  
 11:38:04 **10** focuses a lot on human analog, doing human analysis that  
 11:38:08 **11** seems like it's saying computers can do, too, though may be  
 11:38:12 **12** doing it at a seminal point in time or doing it in a more  
 11:38:15 **13** efficient way.  
 11:38:15 **14** What I'm leading, though, at asking about the  
 11:38:18 **15** post-residue data and that piece and what it adds is there  
 11:38:21 **16** is cited in the patent this Notice of Allowability from the  
 11:38:25 **17** examiner. And in the Notice of Allowability, it does seem  
 11:38:27 **18** to say, at least in the examiner's view, that while  
 11:38:29 **19** filtering, positive and negative filtering via computer  
 11:38:32 **20** probes was done, that the piece of adding the second step of  
 11:38:35 **21** analyzing post-residue data was new, and different, and  
 11:38:38 **22** unusual and significant enough to the examiner that it  
 11:38:41 **23** seemed like it made a difference in terms of at least the  
 11:38:44 **24** patentability step. I don't know whether at 101, or 102, or  
 11:38:48 **25** 103.



11:38:48 **1** But what about that? Isn't that telling me what  
 11:38:50 **2** the patent doesn't quite tell me about this post residue --  
 11:38:53 **3** MR. DESAI: Right. So, that's -- I think the  
 11:38:55 **4** file history issue is simply the examiner saying, This was  
 11:38:57 **5** missing in the particular prior art that was before the  
 11:39:00 **6** examiner. I do not believe you can take that Notice of  
 11:39:05 **7** Allowability and say -- reach the conclusion, Well, this is  
 11:39:08 **8** the invention, the improvement.  
 11:39:11 **9** There's, obviously -- you know, we do a lot of  
 11:39:14 **10** work in IPRs, and there's a distinction between pointing out  
 11:39:17 **11** what's missing in a particular piece of prior art versus how  
 11:39:20 **12** the patentee itself in the specification describes the  
 11:39:24 **13** improvement. And here, it's replete that the -- it's the  
 11:39:28 **14** security analysis.  
 11:39:29 **15** Now, but let me turn to SRI because I think  
 11:39:32 **16** that's a good cite --  
 11:39:32 **17** THE COURT: Before you get into that, one last  
 11:39:34 **18** question about that, because I think what you're getting  
 11:39:35 **19** into is like a common problem with regard to 101 motions at  
 11:39:38 **20** the Rule 12 stage. We don't have a great record. Right.  
 11:39:41 **21** And it's like who to blame or who to benefit for the fact  
 11:39:44 **22** that we don't have a great record, that we have maybe  
 11:39:46 **23** sometimes these tiny pieces that if looked at one way, well,  
 11:39:51 **24** could it support a fact question at step two about whether  
 11:39:54 **25** "X" is the unconventional use of computer technology?

11:39:56 **1** Maybe. Or maybe looked in a different way, no, it's not  
 11:39:59 **2** clear what it said.  
 11:40:00 **3** You know, the patent is not great about this,  
 11:40:01 **4** and it's kind of like: Who do you ding for the fact that we  
 11:40:06 **5** might not have a better record about that or who do you give  
 11:40:09 **6** the benefit of the doubt to?  
 11:40:10 **7** Is there anything you want to say about that?  
 11:40:12 **8** MR. DESAI: I will say in this case the record  
 11:40:15 **9** shouldn't matter for this reason. The claim is -- it's a  
 11:40:20 **10** bare claim of analyzed leftover or unknown data. That's it.  
 11:40:27 **11** It does not tell you in any way, shape or form how you're  
 11:40:31 **12** going to identify a security-related event from that data.  
 11:40:35 **13** It is -- that is the type of abstract claiming analyzing  
 11:40:40 **14** data using a computer as a tool to do exactly what a human  
 11:40:44 **15** can do without adding more.  
 11:40:46 **16** THE COURT: So, this is a great jumping off  
 11:40:48 **17** point to SRI. How did SRI -- was anything different that  
 11:40:51 **18** was happening?  
 11:40:51 **19** MR. DESAI: There is a major difference between  
 11:40:53 **20** this case and SRI. And they made it very clear that BT is  
 11:40:57 **21** hanging their hat on SRI. There's no debating that.  
 11:41:00 **22** But it is a superficial argument based on the  
 11:41:04 **23** fact that the general subject matter is related to network  
 11:41:07 **24** security. And the most important facts here that BT  
 11:41:10 **25** overlooks is that there is nothing in the SRI spec, the

11:41:14 **1** claims or the Federal Circuit opinion, that the improvement  
 11:41:17 **2** involved a human solution.  
 11:41:19 **3** That is a major distinction, and that's clear  
 11:41:22 **4** what we have here for the '237 and '641 patents. And if you  
 11:41:26 **5** look at --  
 11:41:27 **6** THE COURT: And I grant you that and I  
 11:41:28 **7** understand that. You know, we've got a human who's playing  
 11:41:31 **8** a role here, and maybe the patent says a significant role in  
 11:41:33 **9** the invention. But even if one looked at this invention  
 11:41:36 **10** simply by looking at the computerized probe and the work  
 11:41:40 **11** it's doing, how would you differentiate the work that the  
 11:41:42 **12** computerized probes are doing in this invention from the  
 11:41:44 **13** work that the monitors were doing in SRI.  
 11:41:47 **14** MR. DESAI: So, I think just before I answer  
 11:41:49 **15** that question --  
 11:41:49 **16** THE COURT: Sure.  
 11:41:50 **17** MR. DESAI: -- I'd just like to point out there  
 11:41:52 **18** is a significant contradiction in BT's briefing that makes  
 11:41:56 **19** the distinction between SRI and BT's patents clear. At  
 11:42:00 **20** Page 11 of their brief, as we already pointed out, it's very  
 11:42:04 **21** clear that the human can perform the analysis of the claim  
 11:42:08 **22** status data to determine good or bad. That's essential for  
 11:42:11 **23** their patent, right, that the human can do this analysis,  
 11:42:15 **24** the security analysis, right, the security analyst.  
 11:42:19 **25** And it says -- I already read you the quote on

11:42:21 **1** Page 11 of their brief. Three pages later on Page 14 of the  
 11:42:25 **2** brief, BT tries to align itself with *SRI*, and they quote  
 11:42:29 **3** this aspect of the Federal Circuit. They said, "But the  
 11:42:31 **4** Federal Circuit has held that the human mind is not equipped  
 11:42:36 **5** to detect suspicious activity in computer networks."  
 11:42:39 **6** That's the finding in *SRI*. Okay. And that is a  
 11:42:45 **7** clear contradiction. On the one hand, they're saying for  
 11:42:48 **8** their own patent, the human can handle -- is well equipped  
 11:42:54 **9** to detect benign or a threat. But in *SRI*, a human cannot.  
 11:43:03 **10** The only way to resolve this contradiction is  
 11:43:07 **11** that the BT patent, as it says on its face over and over and  
 11:43:10 **12** over again, is about -- directed to the human determining  
 11:43:16 **13** from status data whether data is good or bad, and then  
 11:43:19 **14** updating the probes. The human telling the probe, This is  
 11:43:21 **15** what you should do with that data.  
 11:43:22 **16** Okay. And in *SRI*, the record showed, based on  
 11:43:26 **17** the quote that BT included in its own brief, that a human  
 11:43:30 **18** could not do the specific analysis of the specific data  
 11:43:34 **19** claimed to automatically detect a large-scale attack. That  
 11:43:38 **20** was a significant part of the *SRI* finding, that a human  
 11:43:42 **21** could not do the analysis. And that is the exact opposite  
 11:43:48 **22** of what we have in this case.  
 11:43:49 **23** BT and *SRI* are not the same. BT's patents are  
 11:43:55 **24** directed to a human solution. *SRI* was about a technical  
 11:43:58 **25** solution.

11:43:58 **1** THE COURT: Okay. Mr. Desai, I want to let you  
 11:44:01 **2** save a few minutes for rebuttal. Is there anything you wish  
 11:44:04 **3** to add before you do that?

11:44:05 **4** MR. DESAI: Your Honor, I think I covered the  
 11:44:07 **5** major point about SRI. I just -- I would like to say there  
 11:44:10 **6** is a bit of an issue with respect to the housekeeping on  
 11:44:14 **7** what's claims and what's representative.

11:44:17 **8** In our motion, we had said Claim 18 of the '237  
 11:44:20 **9** was representative. It was not disputed in BT's opposition.  
 11:44:26 **10** Okay.

11:44:26 **11** There is a slide in their slide deck, I don't  
 11:44:29 **12** know if they're going to cover it, where there is now an  
 11:44:32 **13** argument that Claims 1, and 10 and 14 for the '641 are  
 11:44:35 **14** representative. Claims 18, 23 and 25 are representative of  
 11:44:39 **15** the '237. That's not in their opposition brief.

11:44:41 **16** THE COURT: Right. The one that we didn't  
 11:44:43 **17** discuss that I think was probably fairly raised in the  
 11:44:45 **18** Plaintiff's brief is they're citing at Claim 14 and its use  
 11:44:49 **19** across probe correlation. We can talk about that, to the  
 11:44:53 **20** extent you had planned to talk about that on rebuttal.

11:44:56 **21** MR. DESAI: Yeah.

11:44:57 **22** THE COURT: I think that concept is probably  
 11:44:59 **23** fairly raised as an alleged additional distinguisher. So,  
 11:45:02 **24** we can talk about that on rebuttal. Okay?

11:45:05 **25** MR. DESAI: Sure.

11:45:05 **1** THE COURT: Okay. Thank you.

11:45:13 **2** MR. GOLDBERG: Your Honor, if I can hand up some  
 11:45:15 **3** printouts?

11:45:16 **4** THE COURT: You may. Thank you.

11:45:17 **5** MR. GOLDBERG: Thank you so much.

11:45:24 **6** THE COURT: Mr. Goldberg.

11:45:25 **7** MR. GOLDBERG: Your Honor, at step one, you look  
 11:45:27 **8** at what the claim is directed to, its character as a whole.  
 11:45:32 **9** You don't selectively highlight certain keywords emphasizing  
 11:45:36 **10** some parts of the spec, but not other parts of the spec.

11:45:39 **11** So, I want to go through this a little bit more  
 11:45:43 **12** rigorously starting with what the patent says the problem  
 11:45:46 **13** was the inventors were trying to solve. And really the key  
 11:45:49 **14** here is that in the prior art, the security devices, like  
 11:45:53 **15** firewalls, they were inadequate to detect and respond to  
 11:45:57 **16** threats that weren't yet known.

11:45:59 **17** So, they could use filter-based signature  
 11:46:01 **18** matching, for example, to find a known virus. But if a  
 11:46:05 **19** virus didn't yet have a signature, which is sort of like a  
 11:46:08 **20** pattern, it would pass through the device, and it would harm  
 11:46:11 **21** the network.

11:46:12 **22** MR. GOLDBERG: Now, these devices were managed  
 11:46:14 **23** locally by local system administrators. And what the patent  
 11:46:17 **24** explains, these administrators were ill equipped to identify  
 11:46:21 **25** these new threats. In part, because they didn't have the

11:46:24 **1** tools, and experience and the intelligence, meaning  
 11:46:28 **2** information, that they would need to identify these threats.

11:46:31 **3** And the way these devices worked is they would,  
 11:46:35 **4** you know, block the known data viruses, allow the known into  
 11:46:38 **5** traffic, and the rest would just get logged. So, you know,  
 11:46:40 **6** a big pile of what they describe as audit information, sort  
 11:46:43 **7** of all this unknown traffic. And there's really no  
 11:46:45 **8** effective way of mining that adequately enough.

11:46:49 **9** Now, and these devices, because they were  
 11:46:51 **10** managed locally, had very limited visibility. So, you  
 11:46:56 **11** couldn't see what was going on in other networks or other  
 11:46:58 **12** parts of the network they were tied to.

11:47:00 **13** Now, the first point I'd like to make here, and  
 11:47:02 **14** I'll discuss this, you know, in some detail as we get deeper  
 11:47:05 **15** in the presentation, but the patent discloses using local  
 11:47:09 **16** system administrators as part of the prior art. As, you  
 11:47:13 **17** know, they first indicated, the invention has to be more  
 11:47:16 **18** about just incorporating a human, because incorporating a  
 11:47:18 **19** human, the local administrator was already in the record.  
 11:47:21 **20** It's described in the spec, and the patent disparages that  
 11:47:24 **21** solution as ineffective.

11:47:26 **22** THE COURT: Only because the system  
 11:47:28 **23** administrator didn't have the time. The system --  
 11:47:31 **24** presumably if the system administrator had the time to do  
 11:47:34 **25** what the human at the SOC could do, they could have done it.

11:47:37 **1** MR. GOLDBERG: It's more than time, Your Honor.  
 11:47:38 **2** The patent explains they also lack tools. They lack the  
 11:47:42 **3** expertise, and they lack the intelligence.

11:47:44 **4** And so, you know, yes, part of it is the big  
 11:47:47 **5** pile of data at the SOC, but it's also technical and  
 11:47:50 **6** complicated. So, it kind of does align with what *SRI* said  
 11:47:53 **7** about the human mind. And so, the human mind by itself is  
 11:47:55 **8** not enough. It's why at the SOC in our solution we have the  
 11:47:59 **9** analyst system in the '641 claim which is shown as Socrates  
 11:48:03 **10** in Figure 1, Your Honor.

11:48:05 **11** So, even when you have an analyst in the process  
 11:48:06 **12** or an analyst system, it's not just any old human. The SOC  
 11:48:10 **13** has resources that aren't available locally, and the  
 11:48:13 **14** invention makes those resources available in a way they  
 11:48:16 **15** weren't previously.

11:48:17 **16** THE COURT: But, I mean, if you look at, like,  
 11:48:18 **17** the '237 at Claim 18, which the other side focuses on, none  
 11:48:23 **18** of this is claimed. I mean, all that's claimed is a human  
 11:48:27 **19** at the SOC provides "feedback" based on information.

11:48:33 **20** You know, there's no particular claim  
 11:48:36 **21** requirements that the human be super smart, or be utilizing  
 11:48:41 **22** particular claimed resources that the system administrator  
 11:48:44 **23** had a use for. It's just human analyzed data give feedback.

11:48:48 **24** Is it anything more than that?

11:48:49 **25** MR. GOLDBERG: Well, Your Honor, and I would

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11:48:51 **1** first start with regard to the '641, Claim 1. It's an  
 11:48:54 **2** analyst system, not an analyst. But even here, right, it's  
 11:48:57 **3** the point of the analyst being at the SOC. And the patent  
 11:49:01 **4** describes the analyst in a very specific way as somebody who  
 11:49:06 **5** specializes in identifying these types of threats and has  
 11:49:10 **6** access to tools.  
 11:49:11 **7** So, I refer Your Honor, it's Column 2, it's  
 11:49:14 **8** Line 35. And so, you know, the invention, in part, is more  
 11:49:19 **9** than the analyst. It's how you get the information to the  
 11:49:22 **10** analyst. It's what information is sent to the analyst in  
 11:49:26 **11** particular, what you're asking them to do, and then the  
 11:49:29 **12** feedback step that follows the analyst.  
 11:49:32 **13** So, each of these steps, and not just the  
 11:49:34 **14** analyst itself as to the benefit to the invention, increases  
 11:49:39 **15** the functionality of the invention.  
 11:49:40 **16** THE COURT: Let me ask you this, though. I'm  
 11:49:42 **17** not saying they are, but if the claims had four limitations  
 11:49:46 **18** or representative claims, four limitations. And the first,  
 11:49:50 **19** literally all that the claim said for limitation one was  
 11:49:52 **20** filter data.  
 11:49:54 **21** And then limitation two, all that it said was  
 11:49:58 **22** analyze data.  
 11:50:00 **23** And then at step three, it said send data to  
 11:50:04 **24** human for analysis.  
 11:50:07 **25** And at step four, it was human provide feedback

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11:50:10 **1** on data.  
 11:50:11 **2** If that's literally all that was in the claim,  
 11:50:13 **3** would that kind of a claim pass muster under Section 101?  
 11:50:17 **4** And if not, exactly what's different about what's claimed  
 11:50:20 **5** here in these patents?  
 11:50:22 **6** MR. GOLDBERG: So, Your Honor, your analogy  
 11:50:24 **7** would apply to a situation where you had an Excel  
 11:50:27 **8** spreadsheet running on a computer, and you decided at  
 11:50:30 **9** step one you're going to filter all entries under the letter  
 11:50:33 **10** B. And then at step two, you're going to sort it. And then  
 11:50:36 **11** you're going to pass it to a human to say, Hey, does this  
 11:50:39 **12** look good to you? Okay. I'm going to display it. That's  
 11:50:41 **13** straight using the computer as a tool.  
 11:50:43 **14** In our case, there are a series of steps that  
 11:50:45 **15** occur in defined locations in defined sequence for the  
 11:50:49 **16** purpose of improving the underlying system itself. The  
 11:50:52 **17** security device is enabled to do things it couldn't  
 11:50:55 **18** otherwise do.  
 11:50:56 **19** And so, you know, I get the example, and in  
 11:50:59 **20** certain circumstances, like the Excel spreadsheet, that's  
 11:51:03 **21** the quintessential, you know, taking a human process. You  
 11:51:05 **22** know, we all sort of manipulate data in that way and put it  
 11:51:08 **23** on a computer to make it go better, faster and easier. It  
 11:51:10 **24** doesn't disrupt how the computer operates. It doesn't  
 11:51:13 **25** enable new functionality.

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11:51:15 **1** Our invention does. And what the patent  
 11:51:17 **2** describes is you start -- and if I can refer Your Honor to  
 11:51:20 **3** Figure 1. If you look at the prior art, Your Honor, as  
 11:51:24 **4** described in the patent, it's just the firewall, for  
 11:51:26 **5** example, element 1010 protecting a customer network.  
 11:51:29 **6** And what we've done here is added an entire  
 11:51:33 **7** second network here. It's a security-focused network that  
 11:51:37 **8** exists including the probe, and the probe does the first  
 11:51:40 **9** part of the residue analysis. So, that's, you know, as you  
 11:51:44 **10** had correctly said, the Notice of Allowance, which has to be  
 11:51:47 **11** taken as true in this context. The analysis of the residue  
 11:51:51 **12** was the patentable distinction.  
 11:51:52 **13** That occurs in two places, right. The first  
 11:51:54 **14** part is the probe. And then we have communication to the  
 11:51:57 **15** secure operation center where we have in the '641, the  
 11:52:01 **16** analyst system, or the analyst in '237, Claim 18.  
 11:52:05 **17** And so, you know, when they referred earlier --  
 11:52:07 **18** THE COURT: Can I just ask as a factual matter:  
 11:52:09 **19** Is the assertion that what the data that the analyst is  
 11:52:12 **20** looking at at the SOC or the S-O-C, is the data they're  
 11:52:15 **21** looking at the residual data that the probe has already  
 11:52:19 **22** analyzed?  
 11:52:19 **23** MR. GOLDBERG: So, the Plaintiff's point, Your  
 11:52:21 **24** Honor, is there's two statements of analysis or processing  
 11:52:24 **25** at the probe. First, you're going to filter status data,

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11:52:28 **1** and you're doing positive and negative filtering of status  
 11:52:31 **2** data.  
 11:52:31 **3** That's not the traffic itself. It's information  
 11:52:34 **4** that's either generated from or relates to traffic. And  
 11:52:37 **5** you're selecting or discarding certain status information.  
 11:52:41 **6** And then you have the residual status  
 11:52:43 **7** information, okay, and that's what the Notice of Allowance  
 11:52:47 **8** is all about.  
 11:52:47 **9** Now, if you look at it from a preemption point  
 11:52:49 **10** of view, you --  
 11:52:50 **11** THE COURT: I want to get back to my question.  
 11:52:52 **12** I understand you have data that's being filtered. And some  
 11:52:55 **13** data is being filtered out as being fine, and some data is  
 11:52:58 **14** being highlighted or filtered out as being problematic, and  
 11:53:02 **15** some data is just being allowed. Not an issue, it's fine.  
 11:53:05 **16** And then there is some categorization of  
 11:53:07 **17** residual data --  
 11:53:08 **18** MR. GOLDBERG: Yes.  
 11:53:09 **19** THE COURT: -- that the probe then engages in  
 11:53:11 **20** some additional analysis of.  
 11:53:12 **21** MR. GOLDBERG: Yes, Your Honor.  
 11:53:13 **22** THE COURT: Then there's a second later step in  
 11:53:15 **23** which some type of data is sent to the human at the SOC.  
 11:53:17 **24** What data is being sent? Is it just that residual data that  
 11:53:21 **25** has been analyzed by the probe or is it additional data

11:53:23 **1** beyond --

11:53:23 **2** MR. GOLDBERG: It's a subset of that, Your

11:53:25 **3** Honor. So, you have the residue. You identify possible

11:53:28 **4** security events at the probe. And then you send the

11:53:31 **5** information link of possible events up to the analyst or

11:53:34 **6** analyst system in the SOC.

11:53:36 **7** Now, in the dependent claims, you'll have a

11:53:38 **8** level of computerized analysis which could include

11:53:42 **9** cross-correlation. So, it's either two or three independent

11:53:44 **10** claims.

11:53:46 **11** The residue is basically broken up and analyzed

11:53:48 **12** two or three times, Your Honor. And that's really what I

11:53:50 **13** would argue is the crux of the invention.

11:53:52 **14** THE COURT: Are the said identified events that

11:53:53 **15** are sent off to the human in the SOC, are they events that

11:53:57 **16** relate to data that was in the residual data or are they

11:54:03 **17** events that relate to data that was in the residual data and

11:54:03 **18** in some other kind of data that was in the probe that was

11:54:05 **19** assessed?

11:54:06 **20** MR. GOLDBERG: As described by the claims, Your

11:54:07 **21** Honor, it's a subset of residue data that's been selected

11:54:10 **22** through the first level of analysis as being potentially a

11:54:14 **23** problem.

11:54:14 **24** THE COURT: You mentioned the Notice of

11:54:17 **25** Allowance and Paragraph 6, I think, is the part of it where

11:54:18 **1** it talks about at least what was seen as the patentable

11:54:21 **2** distinction by the examiner. Again, you know, I think in

11:54:26 **3** reading that paragraph, I think the thing the examiner is

11:54:29 **4** focusing on, I think what the examiner is basically saying

11:54:32 **5** is: Did prior art computer systems do positive and negative

11:54:36 **6** filtering to look for problematic data from a network

11:54:40 **7** security perspective? Yes.

11:54:41 **8** But what they didn't do, those probes or

11:54:43 **9** computers, what they didn't do is they didn't then reassess

11:54:47 **10** some middle ground of data that was identified as either a

11:54:50 **11** positive or negative like this patent does. And so, in

11:54:55 **12** light of that, we're going to allow these claims.

11:54:59 **13** That second stage of post-residue data analysis

11:55:03 **14** added on to the positive or negative filtering stage is

11:55:07 **15** what's being described in Paragraph 6.

11:55:08 **16** Is that correct?

11:55:09 **17** MR. GOLDBERG: I would clarify that in two ways,

11:55:13 **18** Your Honor. First, signature matching is a form of positive

11:55:15 **19** or negative filtering that's not what's claimed here. It's

11:55:18 **20** filtering of status data. So, I'm not sure he's necessarily

11:55:21 **21** conceding that filtering status data positively and

11:55:23 **22** negatively is what's known in the art, although I do think

11:55:26 **23** it was. But I don't think that's what he's talking about

11:55:29 **24** here.

11:55:29 **25** What he's talking about is residue data. It's

11:55:31 **1** what they describe as the millions of lines of audit

11:55:34 **2** information of unknown data that's just logged and never

11:55:37 **3** looked at. And the way -- what the invention does is looks

11:55:40 **4** at it multiple times in multiple places. So, that's what

11:55:43 **5** he's referring to here about the residue, Your Honor.

11:55:45 **6** THE COURT: But to my larger point, is what the

11:55:47 **7** examiner basically is saying is the thing that is key, the

11:55:50 **8** thing that is important about why I'm going to say this

11:55:53 **9** patent is going to get granted is it's not just positive or

11:55:57 **10** negative filtering, it's positive and negative filtering

11:56:00 **11** plus additional analysis of post-residue data?

11:56:03 **12** MR. GOLDBERG: That's correct, Your Honor.

11:56:04 **13** THE COURT: Okay. Now, in your Complaint when

11:56:05 **14** you cite to this, I don't know, the paragraph in which you

11:56:07 **15** cite to it, it seems like it's focused more on the

11:56:10 **16** additional concept which is captured in some of the

11:56:13 **17** dependent claims, a cross-probe analysis. The idea that I

11:56:16 **18** think prior art systems, and I forget how you say it in the

11:56:19 **19** claim, weren't utilizing data from different points in the

11:56:22 **20** network.

11:56:22 **21** MR. GOLDBERG: Mm-hmm.

11:56:23 **22** THE COURT: Is the whole cross-probe analysis

11:56:27 **23** piece being talked about by the examiner, or is that some

11:56:30 **24** additional piece of unconventional use that you're adding

11:56:34 **25** when you talk about it?

11:56:35 **1** MR. GOLDBERG: It's an additional piece, Your

11:56:37 **2** Honor. So, additional, but related might be a better way of

11:56:40 **3** describing it. So, what the patent does, it solves multiple

11:56:42 **4** problems. One of which is finding unknown threats.

11:56:46 **5** And the other piece is allowing the locally

11:56:48 **6** managed device to benefit from things going on in other

11:56:51 **7** networks. And that's part of why we introduce this

11:56:55 **8** hierarchical level, much as like they did in *SR*.

11:56:57 **9** With cross-probe correlation, what the dependent

11:56:59 **10** claims add is you'll have your positive and negative

11:57:01 **11** filtering of status data. You'll have a first analysis at

11:57:04 **12** the probe that can find the possible security events.

11:57:07 **13** You'll send that over the line to the SOC.

11:57:09 **14** The SOC will now do additional computerized

11:57:12 **15** analysis of the residue using what it's learned from other

11:57:15 **16** locations. So, while it's unknown to you, it might be known

11:57:18 **17** to your competitor. And so, you can now benefit from that.

11:57:22 **18** And then an even smaller refined subset goes to the analyst,

11:57:26 **19** so it's a third layer of analysis of the residue --

11:57:30 **20** THE COURT: So, the cross-probe correlation

11:57:33 **21** discussed in Claim 14, that happens electronically, and it

11:57:35 **22** happens at the SOC?

11:57:36 **23** MR. GOLDBERG: That's correct, Your Honor.

11:57:36 **24** THE COURT: It's not an example. I know Claim

11:57:39 **25** 14 requires that it be computer based.

11:57:39 **1** MR. GOLDBERG: Yeah.

11:57:41 **2** THE COURT: I wasn't sure I understood it

11:57:43 **3** happened at the SOC as opposed to earlier in the probe.

11:57:45 **4** MR. GOLDBERG: And, you know, my notes are tied

11:57:47 **5** to the '641, unfortunately, but the '641, Claim 14 depends

11:57:51 **6** on Claim 10. And Claim 10 makes clear it's a computerized

11:57:54 **7** analysis.

11:57:54 **8** THE COURT: Yeah, Claim '237, similar, although

11:57:57 **9** actually in Claim 14 there, it says computer based.

11:57:59 **10** MR. GOLDBERG: Yes.

11:57:59 **11** THE COURT: So, I guess a related question:

11:58:03 **12** You're talking about the steps of the *Alice* analysis. What

11:58:06 **13** are these claims directed to?

11:58:07 **14** I think probably fairly in your brief, there's

11:58:11 **15** probably three pieces that you highlight as being -- no, I'm

11:58:16 **16** sorry -- maybe four, depending on how you look at it, that

11:58:19 **17** you highlight as being important to the claimed solution

11:58:22 **18** depending on whether we're talking about independent or

11:58:24 **19** dependent claims.

11:58:25 **20** I think you highlight the fact that the claims

11:58:27 **21** utilize the positive and negative filtering aspects that the

11:58:31 **22** probe does. I think you highlight that the claims utilize

11:58:35 **23** an additional analysis of residue data that is either

11:58:39 **24** identified as a positive or negative by the filter. You

11:58:42 **25** identify certainly and talk about how the claims require the

11:58:45 **1** use of the human analyst as to that residue data.

11:58:50 **2** And then you talk about how, fourth, in certain

11:58:53 **3** dependent claims, the concept of cross-probe correlation,

11:58:56 **4** which I think I understand to mean, we're not just going to

11:58:59 **5** be necessarily getting data from one probe, but from

11:59:01 **6** multiple probes, which might be helpful if multiple probes

11:59:04 **7** are seeing the same problem.

11:59:05 **8** And those four components, I think, are all

11:59:07 **9** things you talk about and highlight. I guess for a step one

11:59:11 **10** perspective, what are these claims directed to? What's the

11:59:14 **11** focus of the patent? It seemed to me that in looking at the

11:59:17 **12** patent and the early columns in it, not a lot of discussion

11:59:22 **13** of that analysis, of post filtering. Ironically, the thing

11:59:25 **14** the examiner said is the key to allowance, it's not a

11:59:29 **15** discussion about cross-probe correlation.

11:59:31 **16** Really most of the focus seems to be on, I

11:59:33 **17** think, what you call in your briefing this two-level

11:59:36 **18** analysis. We do some filtering at the probe. We do some

11:59:40 **19** analysis by humans at the SOC.

11:59:41 **20** Is that fair?

11:59:42 **21** MR. GOLDBERG: I don't think so, Your Honor. I

11:59:44 **22** think, first of all, I wouldn't describe it as two-level

11:59:47 **23** analysis. I would describe it as a two-level architecture.

11:59:50 **24** And, you know, going back to Figure 1 here, originally you

11:59:58 **25** just didn't have any of the -- even the locations in which

12:00:01 **1** to do the multiple steps of analysis. All those were tied

12:00:05 **2** together.

12:00:06 **3** But the big piece, Your Honor, that wasn't on

12:00:07 **4** the list, and this may have been a function of just our

12:00:10 **5** drafting, but I do think we covered it is the feedback

12:00:12 **6** element. So, this is designed to improve the computer

12:00:16 **7** system over time. So, not only does the system detect

12:00:19 **8** unknown threats, but the feedback now allows for the filters

12:00:23 **9** to be updated over time so what's unknown can be treated as

12:00:26 **10** known going forward.

12:00:27 **11** So, it improves the device in multiple ways. I

12:00:30 **12** think the feedback step is very important because that's

12:00:33 **13** what takes all the analysis, whether it's one step of an

12:00:36 **14** analysis or two or three, and takes it back to the lower

12:00:40 **15** level to improve the operation of the prior art security

12:00:43 **16** system.

12:00:43 **17** So, I think the feedback element, Your Honor, is

12:00:46 **18** important. And so, that's what I meant when I said earlier,

12:00:49 **19** you know, what happens before the analyst is important. The

12:00:51 **20** analyst is important. And what happens after the analyst is

12:00:53 **21** equally important, and that's the feedback step.

12:00:56 **22** THE COURT: But would you acknowledge that in

12:00:58 **23** the claims and, again, I've been using Claim 18 as an

12:01:02 **24** example of the '237. If we look to see what does the claim

12:01:06 **25** really require of that human at the SOC --

12:01:11 **1** MR. GOLDBERG: Mm-hmm.

12:01:11 **2** THE COURT: -- and if the other side were to

12:01:13 **3** say, you know what, all it requires and all -- the only

12:01:16 **4** thing that can be said it actually requires is that the

12:01:19 **5** human analyze the data. That's it.

12:01:24 **6** MR. GOLDBERG: Mm-hmm.

12:01:25 **7** THE COURT: And then the human provide feedback

12:01:28 **8** on the data. There's no more specific narrowing of

12:01:32 **9** particularized requirements. Anything that amounts to

12:01:36 **10** analysis of data by the human and feedback on the data, that

12:01:39 **11** would count for purposes of the claims; is that correct?

12:01:41 **12** MR. GOLDBERG: I think -- so, Your Honor's

12:01:44 **13** focusing very tightly on that one limitation. What I would

12:01:48 **14** say, you take a step back --

12:01:49 **15** THE COURT: Just answer my question. I want to

12:01:50 **16** know what the limitation means, in your view, before we get

12:01:52 **17** to how maybe it's combined with other limitations or

12:01:55 **18** wherever you're going to go. Is it fair to say that that is

12:01:58 **19** all that it could mean, each of those limitations?

12:02:00 **20** MR. GOLDBERG: Well, and it's fair, Your Honor,

12:02:03 **21** but I think the only reason why that's possible in the first

12:02:05 **22** step are the steps that precede it. So, again, to turn to

12:02:09 **23** the prior art for a second just to draw the distinction

12:02:11 **24** here.

12:02:12 **25** Originally, you had a local system administrator



12:02:15 **1** and they couldn't do the job. So, why couldn't they do the  
 12:02:18 **2** job? And it's volume, as Your Honor said, time and  
 12:02:20 **3** expertise.  
 12:02:20 **4** So, you know, yes, what's happening -- we didn't  
 12:02:24 **5** invent a particular way for the analyst to work. No one  
 12:02:27 **6** claimed we did. We didn't invent a particular way of doing  
 12:02:29 **7** filtering in isolation or anything in isolation.  
 12:02:32 **8** We have an architecture and we plug this all  
 12:02:34 **9** together. And as a result, the human, the analyst, can be  
 12:02:38 **10** involved meaningfully in the process and improve the machine  
 12:02:41 **11** in the way the prior art said they couldn't.  
 12:02:43 **12** So, you know, yes, what they're doing within  
 12:02:45 **13** their space may not be inventive, but the fact that they're  
 12:02:48 **14** able to do it is a function of the architecture.  
 12:02:50 **15** THE COURT: Just so, you know, I think the thing  
 12:02:52 **16** that I'm struggling with a bit is that I think Mr. Desai  
 12:02:57 **17** when he gets up is going to say, Judge, I think you can  
 12:03:00 **18** fairly read a claim like Claim 18 to be a claim that  
 12:03:03 **19** essentially says computer filters data. Computer analyzes  
 12:03:10 **20** some of that data.  
 12:03:11 **21** MR. GOLDBERG: Mm-hmm.  
 12:03:12 **22** THE COURT: Human analyzes that extra -- some of  
 12:03:15 **23** that data. Human provides feedback on data.  
 12:03:18 **24** And he's going to say, If that's what it can  
 12:03:20 **25** fairly be read as, that one, two, three, four, that's like

12:03:23 **1** abstract idea, plus abstract idea, plus abstract idea, plus  
 12:03:27 **2** abstract idea. And, you know, they'll talk about -- you  
 12:03:30 **3** know, I think is it Greenberg that the other side cites?  
 12:03:34 **4** MR. GOLDBERG: *Rosenberg*.  
 12:03:35 **5** THE COURT: *Rosenberg*, sorry, that the other  
 12:03:37 **6** side cites as their most relevant case. Right. I think if  
 12:03:39 **7** you look at that claim, essentially if you look at it, what  
 12:03:41 **8** it kind of looks like is collected, transmitted, processed  
 12:03:45 **9** data, filtered it.  
 12:03:46 **10** You know, they're saying that's what this is.  
 12:03:48 **11** This is filter data, analyze some of that data, human  
 12:03:51 **12** analyze that same data, human provide feedback on that data.  
 12:03:55 **13** I think what I need to hear from you is: Why is  
 12:03:58 **14** that not right? Why is this about something different than  
 12:04:01 **15** that? What would you say?  
 12:04:03 **16** MR. GOLDBERG: Well, Your Honor, look, whether  
 12:04:04 **17** it's *Ankara* or *BASCOM*, you know, specific series of steps at  
 12:04:10 **18** specific locations for specific purposes is patentable  
 12:04:13 **19** subject matter. And to turn to maybe *In Re: Rosenberg*,  
 12:04:16 **20** which I think, you know, Your Honor mentioned as a good way  
 12:04:19 **21** of distinguishing this situation -- let me get to the claim  
 12:04:24 **22** here, Your Honor.  
 12:04:27 **23** So, this is a perfect example when you have a  
 12:04:30 **24** process that a human used to perform, and we've computerized  
 12:04:33 **25** it for speed or efficiency. And here, you know, the

12:04:37 **1** computer, as a result of these steps, functions in exactly  
 12:04:41 **2** the same way it did before.  
 12:04:44 **3** There's no disruption. There's no enablement or  
 12:04:47 **4** new functionality. We were just taking data from these  
 12:04:50 **5** various sites and moving them around, you know, more quickly  
 12:04:53 **6** then previously. You know, the computer system itself, you  
 12:04:57 **7** know, is not disrupted in any way. It's not expanded in any  
 12:05:01 **8** way. And here, given the risk of preempting essentially  
 12:05:05 **9** computerization of clinical trials.  
 12:05:07 **10** So --  
 12:05:07 **11** THE COURT: Nor here is the computer disputed or  
 12:05:10 **12** expanded -- the use of the computer is disrupted or  
 12:05:13 **13** expanded, to use your words, in a way that distinguishes  
 12:05:15 **14** what's going on to say what was happening *In Re: Rosenberg*.  
 12:05:19 **15** MR. GOLDBERG: Yeah, Your Honor. So, in our  
 12:05:20 **16** case, a prior art system, as described in the spec, which  
 12:05:23 **17** was unable to be managed -- find new threats and was managed  
 12:05:27 **18** locally is now enabled to be managed remotely to identify  
 12:05:31 **19** new threats, unknown threats in real time in a way that  
 12:05:33 **20** works and balances all the constraints of a modern network.  
 12:05:37 **21** And the patent explains that in the prior art, all the prior  
 12:05:39 **22** art device did was either log, or, in the case of Notice of  
 12:05:44 **23** Allowance, discard this big pile of residue.  
 12:05:46 **24** Well, that's what you would expect to happen in  
 12:05:48 **25** the ordinary course. We disrupted that by now you're going

12:05:50 **1** to take this residue, and you're going to analyze two or  
 12:05:53 **2** three times at different locations and defined hierarchy for  
 12:05:57 **3** different things. So, in that sense, it's very distinct  
 12:06:00 **4** from *In Re: Rosenberg*, Your Honor.  
 12:06:01 **5** And if I can focus just a little bit, Your  
 12:06:04 **6** Honor, on the *SRI* claim.  
 12:06:06 **7** THE COURT: Yeah. I guess that's maybe the last  
 12:06:07 **8** piece we'll have, because you're close to the end of your  
 12:06:09 **9** time.  
 12:06:10 **10** MR. GOLDBERG: Understood, Your Honor.  
 12:06:11 **11** THE COURT: Tell me more about -- now,  
 12:06:12 **12** particularly, if you'll address -- I asked Mr. Desai to  
 12:06:17 **13** distinguish the claim. He talks about the fact that we have  
 12:06:18 **14** a human component here in our claim. And he talks about the  
 12:06:21 **15** *SRI* Court's conclusion with regard to the claim at issue  
 12:06:25 **16** there, that the human mind wasn't equipped to do the kind of  
 12:06:29 **17** work that the claimed monitors were doing.  
 12:06:32 **18** MR. GOLDBERG: Mm-hmm. So, I think what  
 12:06:33 **19** Mr. Desai is talking about is really the automatically  
 12:06:36 **20** receiving and integrating the report step of the '615 and  
 12:06:39 **21** talking about what happens at our SOC. And really I have  
 12:06:43 **22** four responses to that, Your Honor.  
 12:06:45 **23** The first, again, I know we're focused on the  
 12:06:47 **24** '237 claim here, but in the '641, we don't have an analyst.  
 12:06:51 **25** We have an analyst system. And I do believe we mentioned



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12:06:53 **1** that in our briefing, Your Honor.

12:06:54 **2** The dependent claims, including 14, have

12:06:57 **3** additional computerized analysis at the SOC. And so, I have

12:07:01 **4** a hard time seeing -- I have never seen any case law

12:07:04 **5** supporting that you can have computerized analysis of the

12:07:07 **6** SOC, but then, because you add a human step, that somehow

12:07:10 **7** negates everything else in the claims, Your Honor.

12:07:13 **8** So, even if you have to have automatically

12:07:16 **9** necessarily requires computerized, and I'm not sure it does,

12:07:20 **10** we have that in the dependent claims, Your Honor, it lines

12:07:24 **11** up perfectly. So, yes, we do. We have an extra step.

12:07:27 **12** Again, and I've never seen any case law that

12:07:30 **13** says -- putting aside the computerized step, I've never seen

12:07:33 **14** any case law that says, Your Honor, that you can't have a

12:07:35 **15** human in the process, if the idea here is the human helps

12:07:39 **16** improve the operation of the machine.

12:07:41 **17** It's the reverse of a typical 101 case. In the

12:07:44 **18** 101 case, you've got a human process and you're

12:07:47 **19** computerizing it. Here, you've got a process a human can't

12:07:50 **20** participate in, which is what the spec says. As a result of

12:07:53 **21** the invention, the human is able to participate in the

12:07:56 **22** process, and the machine's input is the result, Your Honor.

12:07:59 **23** THE COURT: When the probe, the claimed probe is

12:08:03 **24** filtering data positively or negatively, is that something a

12:08:07 **25** human could do?

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12:08:07 **1** MR. GOLDBERG: You know, I don't think so, Your

12:08:09 **2** Honor. This is incredibly technical stuff. I mean, if you

12:08:13 **3** had an abstract, you know, one piece of data, and you had

12:08:18 **4** this, you know, one thing trying to match it to, maybe.

12:08:22 **5** Practically, no, if it's visible like that way.

12:08:24 **6** In the context of the computer network, Your

12:08:27 **7** Honor, I think what *SR*/said is, you know, human minds are

12:08:30 **8** not equipped to do this in any meaningful sense in the

12:08:33 **9** securities context. You can maybe try to do some small

12:08:36 **10** slice of something, but that's not what this is about, Your

12:08:36 **11** Honor.

12:08:38 **12** So, let me answer as no.

12:08:40 **13** THE COURT: Could a human analyze post-residue

12:08:42 **14** data in a way that the probe, the claimed probe does?

12:08:44 **15** MR. GOLDBERG: I would say no, Your Honor.

12:08:46 **16** THE COURT: Could not?

12:08:47 **17** MR. GOLDBERG: No. And, again, that would be --

12:08:50 **18** THE COURT: Why?

12:08:50 **19** MR. GOLDBERG: Well, and the patent explains

12:08:52 **20** that, and that's where in the background that there's just

12:08:55 **21** too much of it at that point, and there's not the tools and

12:08:58 **22** context needed in order to process this information.

12:09:01 **23** THE COURT: Could a human do it if the human

12:09:03 **24** just had more time?

12:09:04 **25** MR. GOLDBERG: I don't think so, Your Honor.

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12:09:06 **1** They would still lack the intelligence the hierarchical

12:09:09 **2** structure creates.

12:09:09 **3** THE COURT: Okay. All right. I think we're at

12:09:12 **4** your time, Mr. Goldberg. Thank you.

12:09:15 **5** Why don't I hear a couple minutes of rebuttal

12:09:19 **6** from the other side.

12:09:24 **7** Mr. Desai.

12:09:25 **8** MR. DESAI: Sure. I had their slides up here.

12:09:28 **9** There was a claim here quickly. Well, just let me start

12:09:30 **10** with the post-filtering residue analysis. Okay.

12:09:33 **11** This is a black-box generic analysis. Okay.

12:09:38 **12** The human gets information. That's what the claim says. It

12:09:42 **13** says transmit information. It doesn't say what it's

12:09:47 **14** getting. Could be all the residue data, could be some of

12:09:49 **15** it. Right. That's --

12:09:51 **16** THE COURT: I mean, it seems pretty clear. It's

12:09:53 **17** like the filter filtering out certain data and then it says

12:09:57 **18** certain data is good. Then there's this post-residue data

12:10:00 **19** which is like this in-between data. The other side says

12:10:04 **20** it's that post-residue data which is analyzed by the probe.

12:10:06 **21** But then whatever is sent to the human is going to be some

12:10:10 **22** subset of that.

12:10:10 **23** You disagree?

12:10:12 **24** MR. DESAI: I disagree that's in the claim.

12:10:13 **25** Absolutely.

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12:10:13 **1** THE COURT: What do you think is happening in

12:10:15 **2** the claim?

12:10:15 **3** MR. DESAI: It says transmit information.

12:10:17 **4** That's what it says. If we -- I'm sorry, if we could switch

12:10:20 **5** over to -- I'm sorry. Sorry, Your Honor. Apologies for

12:10:24 **6** that.

12:10:24 **7** THE COURT: And that information, you're saying

12:10:27 **8** it might be information about that post-residue data, but it

12:10:30 **9** could be information about maybe data that was filtered; is

12:10:33 **10** that right?

12:10:33 **11** MR. DESAI: If we look at all three of these

12:10:36 **12** claims up here, if we look at Step C, transmitting

12:10:39 **13** information about said identified events. It could be all

12:10:43 **14** of the residue data. It could be some of it. It's -- the

12:10:46 **15** idea that this claim is specific in that way is just wrong.

12:10:50 **16** It's not there.

12:10:51 **17** THE COURT: All right. I'm not even sure why it

12:10:54 **18** might matter, though if it did matter, could it be said

12:10:56 **19** arguably that that's a claim-construction-type issue?

12:10:58 **20** MR. DESAI: I don't think so, and it does matter

12:11:00 **21** because I think what we heard is that the human can't

12:11:04 **22** analyze the same data as the probe. And, again, that's

12:11:08 **23** clearly wrong in this patent.

12:11:10 **24** THE COURT: Do you think it's wrong to say that

12:11:12 **25** a human can't filter data in the way that the probe is meant

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12:11:15 **1** to do it?

12:11:16 **2** MR. DESAI: Not in the way this patent is

12:11:18 **3** claiming it.

12:11:18 **4** THE COURT: Why do you say that?

12:11:19 **5** MR. DESAI: The patent is simply saying, Here is

12:11:21 **6** status data. Is it good or is it bad? A human could

12:11:23 **7** absolutely do that. If you look at their Complaint, they've

12:11:26 **8** pointed to, for example, status data being an IP address,

12:11:28 **9** right. A human can certainly check an IP address against a

12:11:33 **10** good and a bad list. No question about it.

12:11:36 **11** The issue is: Can it do it as quick as a

12:11:38 **12** computer? Well, we know that's not -- that's using a

12:11:41 **13** computer as a tool.

12:11:42 **14** So, the idea that the filtering and the res --

12:11:47 **15** and the analysis by the probe are somehow different than the

12:11:50 **16** analysis that the human is doing is wrong.

12:11:51 **17** THE COURT: To go back, though, so take this

12:11:53 **18** point, right. Can a human filter data in a way or in a

12:11:57 **19** manner that the claim is requiring the probe?

12:11:59 **20** And then go back to *SRI*, when *SRI* is talking

12:12:02 **21** about the work on the monitors, and it says, you know, *Cisco*

12:12:06 **22** also submits the asserted claims are so general that they

12:12:08 **23** encompass steps that people can both do in their minds,

12:12:11 **24** allegedly confirming the practical abstract concept.

12:12:14 **25** We disagree. This is not the type of human

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12:12:16 **1** activity that 101 is meant to exclude. Indeed, we tend to

12:12:19 **2** agree, tend to agree, not even super conclusive, with *SRI*

12:12:23 **3** that the human mind is not equipped to detect suspicious

12:12:27 **4** activity by using network monitors and analyzing network

12:12:31 **5** packets as recited by the claims.

12:12:35 **6** I mean, obviously, a human wouldn't be using a

12:12:37 **7** monitor, right. It's whether the human would be doing the

12:12:39 **8** same thing that the computer is doing in the same way. How

12:12:43 **9** do you distinguish what's going on there from what's maybe

12:12:46 **10** known or unknown about the filtering process?

12:12:48 **11** MR. DESAI: Right. The way I distinguish what's

12:12:50 **12** going on in *SRI* from what's going on in this case is the

12:12:53 **13** patent specification and the language in this case, which is

12:12:56 **14** different than what's in *SRI*.

12:12:57 **15** In this case, it is talking about the positive

12:13:01 **16** and negative filtering, okay, which the Complaint itself

12:13:05 **17** acknowledges is a white list and a black list. Okay. And

12:13:09 **18** there's no volume amounts. There's no scale issue here.

12:13:12 **19** None of that is in this claim.

12:13:13 **20** And the issue is simply: Can a human do the

12:13:17 **21** filtering of an IP address by comparing it to a white list

12:13:21 **22** or a black list? Categorically, they can. The only

12:13:24 **23** difference with the probe is it can do it faster, like all

12:13:27 **24** computers can do things faster than humans.

12:13:29 **25** THE COURT: If I was citing to something for

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12:13:31 **1** that purpose, and I can't cite to Mr. Desai's oral argument,

12:13:34 **2** what do I cite in the record for that proposition?

12:13:36 **3** MR. DESAI: The fact that a human can do --

12:13:39 **4** THE COURT: The type of filtering that's

12:13:40 **5** claimed, like what part of the record do I cite? What part

12:13:42 **6** of the patent?

12:13:43 **7** MR. DESAI: There's the part of the patent that

12:13:46 **8** we -- for some reason the computer wanted access to the

12:13:51 **9** camera. Let me -- it would be this part of the patent right

12:13:54 **10** here which just says what's positive filtering and what's

12:13:58 **11** negative filtering. It's selecting good information and

12:14:00 **12** discarding bad information. And the part of their Complaint

12:14:04 **13** that talks about a white list and a black list, and these

12:14:08 **14** are -- there's also a case, I believe we cited cases, that

12:14:11 **15** say filtering is just, you know, conventional routine

12:14:15 **16** activity that people have done for who knows how long,

12:14:19 **17** right.

12:14:19 **18** And this is not some special type of filtering.

12:14:22 **19** This is literally good and bad filtering. Okay.

12:14:28 **20** Let me -- I think they didn't cover it. You

12:14:32 **21** have their slide, though, BT Slide Number 5. And this was a

12:14:38 **22** slide that caught my eye that I really wanted to show Your

12:14:40 **23** Honor. And they didn't show it, but I'm going to show it.

12:14:45 **24** Let me get to it really quick.

12:14:47 **25** Right. It says, "The inventors realized that

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12:14:51 **1** any successful solution needed to balance several competing

12:14:51 **2** interests."

12:14:56 **3** So, this is what the inventors realized. This

12:14:58 **4** is their slide. If you take a look at every single one of

12:15:01 **5** those citations, it's about the security analyst.

12:15:03 **6** The first bullet, there's a quote from that

12:15:06 **7** portion, 24, 20. It says, "Security analysts can escalate

12:15:09 **8** the handling of the incident."

12:15:11 **9** 2, 13 to 18, that's talking about analyze by

12:15:14 **10** trained security analysts.

12:15:16 **11** 3, 22 is just simply "reduce volume of data

12:15:20 **12** for -- worthy of analysis. We've talked about how just

12:15:23 **13** simply taking computer and reducing what a human should

12:15:25 **14** review is not patent eligible. There's case law that --

12:15:29 **15** Federal Circuit case law that says that explicitly.

12:15:32 **16** And then the last one is, "Security analysts are

12:15:35 **17** personalized personnel specializing in the analysis of

12:15:37 **18** network attacks." These are the quotes from what they put

12:15:40 **19** in their slide about what the inventors realized. It is not

12:15:43 **20** about post-filtering residue analysis.

12:15:46 **21** And if you go to the specification, the

12:15:49 **22** beginning like you mentioned, Your Honor, that is not what

12:15:52 **23** the patent describes as the improvement. And we have to be

12:15:58 **24** guided here, according to the Federal Circuit, by what the

12:16:00 **25** specification tells us is the improvement, not the

12:16:05 **1** after-the-fact discussion.

12:16:07 **2** THE COURT: Okay. Mr. Desai, you're about at

12:16:09 **3** your time. So, thank you. I appreciate the arguments from

12:16:12 **4** both sets of counsel.

12:16:13 **5** Okay. Before I adjourn for lunch and to think

12:16:17 **6** more about what's been said today, I did mention that I

12:16:21 **7** wanted to -- you know, I've got a bunch of smart folks who

12:16:25 **8** work in patent litigation and have thought about Section 101

12:16:28 **9** issues a lot. I don't know what number these 101 motions

12:16:32 **10** are in terms of that I've decided, but I don't think I'm at

12:16:36 **11** a hundred, but I might be past, you know, 50. So, it's

12:16:39 **12** something I do a lot. And yet, obviously, it's a difficult

12:16:43 **13** area of the law and it's ever changing.

12:16:46 **14** And so, I want to try to get the benefit of the

12:16:49 **15** fact that you're all here. If there's anything you could

12:16:52 **16** add to what's already been said that will help me, not only

12:16:57 **17** in these cases, but in other cases. So, I think really the

12:16:59 **18** question I'll ask is just the one that I suggested earlier,

12:17:02 **19** which is -- you know, I'm not really asking for you to make

12:17:06 **20** additional argument about your particular case. It might be

12:17:09 **21** that what you're saying could have some relevance to it, but

12:17:11 **22** I'm asking you to be more general.

12:17:12 **23** But is there anything about Section 101

12:17:15 **24** jurisprudence that you think that Courts generally, maybe

12:17:18 **25** today or in general, are not quite getting right all the

12:17:23 **1** time, or they need to be kind of thoughtful about, or is it

12:17:27 **2** maybe always analyzed in the right way?

12:17:30 **3** Again, like, I'll give you an example just some

12:17:33 **4** of the -- when I asked the question about how in the letter

12:17:35 **5** briefing, you know, there were some cases or portions of

12:17:38 **6** cases that the parties, I mean, which are really helpful.

12:17:42 **7** Like in *American Axle*, I think Judge Dyk talks about the

12:17:46 **8** concept of how how, you know, is very relevant to,

12:17:51 **9** obviously, multiple different components of the, you know,

12:17:55 **10** validity or eligibility analyses, but in different ways.

12:17:59 **11** And, you know, it's the claimed how that's particularly

12:18:02 **12** relevant to eligibility. It's the specification's assertion

12:18:04 **13** of how that's particularly relevant to 112 issues, written

12:18:09 **14** description, enablement. And I don't think I had seen them

12:18:11 **15** before. It's a really helpful way of kind of like, yeah,

12:18:13 **16** that's right, of course.

12:18:14 **17** Any way, if there's anything like that that

12:18:16 **18** you-all have been thinking or like, you know, just to help a

12:18:20 **19** federal judge that is doing this a lot, I want to get the

12:18:23 **20** benefit of your thoughts.

12:18:24 **21** So, let me first turn, and not that there has to

12:18:27 **22** be. We may have said all that can be said really about

12:18:30 **23** these issues today.

12:18:31 **24** But anything on the Plaintiff's side here on our

12:18:33 **25** first case that BT would like to share?

12:18:36 **1** Mr. Goldberg.

12:18:37 **2** MR. GOLDBERG: Nothing comes to mind, Your

12:18:39 **3** Honor.

12:18:39 **4** THE COURT: Okay. All right.

12:18:40 **5** And on Defendant's side?

12:18:41 **6** Mr. Desai.

12:18:41 **7** MR. DESAI: Your Honor, I have a quick comment,

12:18:43 **8** and it has to do with what claims should be addressed in a

12:18:46 **9** motion to dismiss. And I think that's an area of

12:18:49 **10** uncertainty as to -- and it is particularly -- there is,

12:18:51 **11** obviously, relevance to our cases. We have noted in our

12:18:55 **12** papers that Your Honor can dismiss this Complaint without

12:18:58 **13** addressing the dependent claims, and there is some case law

12:19:01 **14** from Delaware that confirms that.

12:19:03 **15** There's a little guidance from the Federal

12:19:05 **16** Circuit. There's a recent case, I think, where a Plaintiff

12:19:07 **17** was requesting that unasserted claims should not be

12:19:10 **18** addressed and the Federal Circuit agreed.

12:19:11 **19** THE COURT: Right. So, that's the -- it begins

12:19:14 **20** with a H, I think. I think it was a post decision, but I

12:19:16 **21** think one of the parties cited that. I think it was

12:19:19 **22** Postscript that cited it in. Somebody cited it in.

12:19:20 **23** It's the Federal Circuit case, I think it was

12:19:23 **24** Judge Bryson, was basically saying, I think, in that case,

12:19:26 **25** it's a little complicated because not only were the other

12:19:30 **1** claims not specifically referenced in the Complaint, but I

12:19:33 **2** think at oral argument the patentee was saying, Yeah, we're

12:19:36 **3** not asserting that.

12:19:37 **4** MR. DESAI: Yeah.

12:19:38 **5** THE COURT: Harder call might be like what if

12:19:41 **6** the Complaints, like they always do, say at least Claim 1,

12:19:44 **7** don't say much in the way of what about the other ones.

12:19:47 **8** When you don't have that kind of admission, are the other

12:19:49 **9** claims in or out for purposes of being eligible to assess?

12:19:53 **10** MR. DESAI: Well, I think the issue there is

12:19:56 **11** this is a *Iqbal-Twombly* pleading issue. I mean, some would

12:20:01 **12** say patent cases are not special. And when you're

12:20:03 **13** dismissing a Complaint, you're dismissing what's pled.

12:20:06 **14** THE COURT: And on that front, let me just ask

12:20:07 **15** you -- this is a vague question that doesn't necessarily

12:20:09 **16** have to do with 101, right, but I think about it sometimes.

12:20:12 **17** So, the way I think it works in patent

12:20:13 **18** litigation is, you know, the Complaint will say, you know,

12:20:15 **19** Patent Number '123, at least Claim 1, right, and then it

12:20:20 **20** states a claim as to why there's, you know, plausible

12:20:23 **21** assertion of infringement as to Claim 1 of the '123 patent.

12:20:27 **22** And then like it seems like everyone just agrees

12:20:31 **23** by way of like mutually asserted structure that the way

12:20:35 **24** we're going to do this forward is we're not going to make

12:20:37 **25** the patentee go back and amend the Complaint to say Claim 1,

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12:20:41 **1** Claim 2 and Claim 3. The patentee is going to provide  
 12:20:44 **2** infringement contentions. Everybody knows that they could  
 12:20:46 **3** literally just go back and then attach the contentions and  
 12:20:48 **4** say that's enough to add those claims.  
 12:20:50 **5** But like for other areas of the law, right,  
 12:20:54 **6** wouldn't you be like having to say, plausibly, that like  
 12:20:58 **7** Claim 2 or Claim 3?  
 12:20:59 **8** MR. DESAI: I think this is a major issue that I  
 12:21:02 **9** don't know how it would get to the Federal Circuit. But in  
 12:21:05 **10** other areas of the law, especially, you know, you read in  
 12:21:08 **11** the pleadings standards are designed so that you cannot use  
 12:21:11 **12** Complaints as a fishing expedition to look for an additional  
 12:21:16 **13** pleading. If your operative pleading is deficient because  
 12:21:21 **14** what you've pled is ineligible, the Complaint is dismissed.  
 12:21:25 **15** You may seek leave to amend your Complaint if that's  
 12:21:29 **16** appropriate and if it's not futile, for example. But those  
 12:21:32 **17** are all pleading issues.  
 12:21:33 **18** And I think what we're mixing up is pleading  
 12:21:36 **19** standards granting patent specifications some sort of  
 12:21:39 **20** special unique pleading standards versus docket control  
 12:21:43 **21** procedures like infringement contentions, which are very  
 12:21:46 **22** different.  
 12:21:47 **23** THE COURT: Put differently, if you have a  
 12:21:50 **24** particular contract claim and you in your Complaint, List  
 12:21:52 **25** two theories as to why that contract was breached, right,

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12:21:56 **1** it's because they've breached Section 1.2 and 1.4. And then  
 12:22:01 **2** later in the case, you say to the other side, I've got three  
 12:22:05 **3** more that were pressing here in Section 6.2.  
 12:22:09 **4** If the other side were to say, What are you  
 12:22:10 **5** talking about? That's not alleged in your Complaint. In  
 12:22:12 **6** your view, would that be kind of an allegation of breach of  
 12:22:15 **7** contract that's not in the case?  
 12:22:16 **8** MR. DESAI: I think in most breach of contract  
 12:22:18 **9** cases, that motion to dismiss would be decided before the  
 12:22:21 **10** Plaintiff ever has the chance to get that theory. And  
 12:22:24 **11** patent cases are different in that way where often times the  
 12:22:28 **12** motion to dismiss is hanging around, and then infringement  
 12:22:32 **13** contentions and discovery are ongoing. And so, that is a  
 12:22:35 **14** major difference, I think, in patent cases.  
 12:22:37 **15** THE COURT: And back to your original point  
 12:22:39 **16** about the way we've represented claim analysis in 101. The  
 12:22:42 **17** way I thought of it, tell me if you think this is wrong, is  
 12:22:44 **18** the movant will say, I think Claim 1 is representative.  
 12:22:48 **19** And then we see what the patentee says in the  
 12:22:50 **20** answering brief. You know, if the patentee talks about  
 12:22:52 **21** Claim 1 and they don't talk about any other claims, well  
 12:22:56 **22** *Berkheimer* would say, Well, they haven't made an argument as  
 12:22:58 **23** to the representativeness of any of those other claims.  
 12:23:00 **24** They just essentially acknowledged it's all about Claim 1.  
 12:23:03 **25** Everybody lives and dies with Claim 1.

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12:23:05 **1** MR. DESAI: Yes.  
 12:23:05 **2** THE COURT: If the patentee goes on to talk  
 12:23:07 **3** about other claims in the patent and why it is that they add  
 12:23:11 **4** an additional thing that's relevant to the eligibility mix,  
 12:23:15 **5** then fairly the Defendant in the reply brief has got to  
 12:23:18 **6** address those other claims, too, that they've been raised.  
 12:23:21 **7** MR. DESAI: Yes.  
 12:23:22 **8** THE COURT: And I guess presumably would say  
 12:23:24 **9** they have been asserted, even if maybe they're not talked  
 12:23:26 **10** about in the Complaint. Do you think that's all right?  
 12:23:28 **11** MR. DESAI: The part I question is whether  
 12:23:30 **12** they've asserted --  
 12:23:31 **13** THE COURT: Yeah.  
 12:23:32 **14** MR. DESAI: -- which is the pleading standards  
 12:23:34 **15** and whether you need to dismiss allegations that are not in  
 12:23:38 **16** the Complaint.  
 12:23:39 **17** THE COURT: Okay. And if the patentee said,  
 12:23:43 **18** Well, whatever we said in the Complaint, I'm saying by  
 12:23:45 **19** raising claim "X" in our brief, we're asserting this. That  
 12:23:51 **20** sounds like from that recent Federal Circuit case, that  
 12:23:53 **21** might be enough.  
 12:23:54 **22** MR. DESAI: It might be. It might be.  
 12:23:56 **23** THE COURT: All right. Anything further,  
 12:23:57 **24** Mr. Desai?  
 12:23:58 **25** MR. DESAI: That was it, Your Honor.

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12:24:00 **1** MR. GOLDBERG: Your Honor, as that was directed  
 12:24:02 **2** primarily at our case, can I rebut briefly?  
 12:24:05 **3** THE COURT: Sure. Sure.  
 12:24:06 **4** MR. GOLDBERG: Thank you. Your Honor, just the  
 12:24:07 **5** Complaint here has broad statements of infringement with  
 12:24:10 **6** regard to the patents in general and also includes a  
 12:24:13 **7** specific example, but it describes a lot of the  
 12:24:17 **8** functionality like cross-probe correlation in the Complaint  
 12:24:20 **9** expressly. And I think there's no question that Defendants  
 12:24:24 **10** here were under notice. That was part of --  
 12:24:26 **11** THE COURT: I want to try to keep it out of  
 12:24:28 **12** that. I know what you're saying. Some of this may have  
 12:24:30 **13** some relation. Let me talk more generally with you about  
 12:24:33 **14** like the representative analysis claim.  
 12:24:35 **15** Like you think like if you have a Complaint that  
 12:24:37 **16** says, you know, patent '123, at least Claim 1 is infringed  
 12:24:43 **17** and explains why, and then we have an eligibility challenge  
 12:24:47 **18** at the Rule 12 stage, if the Plaintiff doesn't say anything  
 12:24:51 **19** else, like, you know, only talks about Claim 1, doesn't  
 12:24:55 **20** mention anything about any other claims in its briefing or  
 12:24:57 **21** argument, is the way that the judge should view that as,  
 12:25:00 **22** well, only Claim 1 is asserted in the case; that's the only  
 12:25:03 **23** claim I can address at a Rule 12 stage?  
 12:25:05 **24** MR. GOLDBERG: Well, as Your Honor noted, it's  
 12:25:08 **25** an efficiency claim, right. And I think there's a standard

12:25:11 **1** that there's a notice of pleading, so they may just come  
 12:25:13 **2** back around and define a different claim. It seems like if  
 12:25:16 **3** you have a situation where the parties are on notice that  
 12:25:17 **4** the other claims may be asserted for the functionality  
 12:25:21 **5** that's described, it's probably more efficient to rule on  
 12:25:23 **6** all in one shot. But whether Your Honor has to is a  
 12:25:26 **7** different question.  
 12:25:26 **8** THE COURT: I guess I could always ask the  
 12:25:28 **9** Plaintiff, right, at the argument, Look, are you asserting  
 12:25:30 **10** other claims? And if the Plaintiff says either yes or,  
 12:25:34 **11** well, we could or we might be, that might be enough to keep  
 12:25:37 **12** them in?  
 12:25:37 **13** MR. GOLDBERG: And the other point, Your Honor,  
 12:25:38 **14** is a bit of inconsistency between this and the Delaware  
 12:25:42 **15** local rules which would kind of define time for the  
 12:25:45 **16** Plaintiff to identify which specific claims that are  
 12:25:47 **17** infringed. It would really be a new standard to force the  
 12:25:49 **18** Plaintiff to identify all the claims they are alleging  
 12:25:52 **19** infringed expressly in the Complaint well ahead of the time  
 12:25:55 **20** specified in our local rules.  
 12:25:58 **21** THE COURT: No, I understand. I think it's a  
 12:25:59 **22** question of, Well, what do you do in the interval? Like  
 12:26:02 **23** what does it mean to not to have done that yet for purposes  
 12:26:04 **24** of what's being asserted?  
 12:26:06 **25** MR. GOLDBERG: Yeah.

12:26:06 **1** THE COURT: Okay. Thank you, Mr. Goldberg. I  
 12:26:10 **2** appreciate that.  
 12:26:10 **3** Let me give counsel for the other guys a chance  
 12:26:12 **4** to add anything they'd like to add about 101 law that I  
 12:26:16 **5** should be thinking about generally. Let me ask in the  
 12:26:21 **6** Attentive cases, the Plaintiff's counsel, if there's  
 12:26:22 **7** anything that they'd like to add.  
 12:26:25 **8** Mr. Weinberg.  
 12:26:27 **9** MR. WEINBERG: Sure. It's a very big question,  
 12:26:33 **10** and I think that to say the District Court is getting  
 12:26:38 **11** something inconsistent, the Federal Circuit is getting  
 12:26:40 **12** consistent, I think there's very quibble in that latter  
 12:26:46 **13** camp. So, it's putting the District Courts in a very  
 12:26:49 **14** difficult spot because the Federal Circuit's opinions are  
 12:26:51 **15** quite panel specific. And often the briefing, because of  
 12:26:57 **16** that, puts the District Court in a bind.  
 12:26:59 **17** It seems as though Plaintiff's counsel submits a  
 12:27:03 **18** brief that says the word specific over and over again. The  
 12:27:05 **19** Defendant submits something that says generic and  
 12:27:08 **20** conventional over and over again.  
 12:27:10 **21** THE COURT: I think the words specific, and  
 12:27:12 **22** particular and concrete are like whatever that means is like  
 12:27:17 **23** a key to 101.  
 12:27:18 **24** MR. WEINBERG: I think it means that you're  
 12:27:20 **25** about to read a long run-on sentence what the claim is about

12:27:24 **1** and that appears specific. I would say that maybe one thing  
 12:27:28 **2** that the District Courts might be able to do to help this  
 12:27:31 **3** out is to be a little bit more deliberate than the parties  
 12:27:36 **4** tend to be on the doctrines that are being applied. If the  
 12:27:39 **5** Federal Circuit has two lines of case law, one about  
 12:27:42 **6** specificity, for example, and another one about  
 12:27:44 **7** technological inventions, and those are competing threads,  
 12:27:48 **8** and they're being applied separately, they're being called  
 12:27:52 **9** out separately.  
 12:27:52 **10** In the opinions, it should be a bit of an  
 12:27:58 **11** enunciation. This is what we're applying. This is why this  
 12:28:00 **12** is most applicable here. These are the pieces of this  
 12:28:05 **13** particular doctrine.  
 12:28:06 **14** THE COURT: And in that regard, if we're talking  
 12:28:08 **15** about claims to computer software, or computer  
 12:28:13 **16** functionality, in your view, are there really kind of two  
 12:28:16 **17** lines of authority? One that would say, Look, there's a  
 12:28:20 **18** path to eligibility that's simply about specificity and  
 12:28:25 **19** particularity separate and apart from unconventionality?  
 12:28:30 **20** And then there's a path that's like an unconventional use of  
 12:28:34 **21** computer technology path, and those are two different paths?  
 12:28:37 **22** Is that what you're suggesting, even in that  
 12:28:38 **23** realm?  
 12:28:39 **24** MR. WEINBERG: Yeah, this is a bit murky,  
 12:28:41 **25** because they are discussing *TecSec*, for example, Judge

12:28:47 **1** Taranto says it's two different inquiries that we find  
 12:28:49 **2** relevance to computer-implemented inventions with  
 12:28:51 **3** specificity. And the technical aspect of it, how this is a  
 12:28:56 **4** technical invention.  
 12:28:58 **5** The specificity stuff comes from 200 years ago.  
 12:29:01 **6** It's from all those, a variety, and those tests that  
 12:29:07 **7** predates *Alice* by a long shot. *Alice* is more of a  
 12:29:10 **8** procedural mechanism for getting at that underlying  
 12:29:13 **9** question. The technical --  
 12:29:14 **10** THE COURT: *Alice* is really what kind of gave us  
 12:29:16 **11** this, you know: Is it just do it on a computer or is it  
 12:29:21 **12** unconventional use kind or at least -- right? Is that kind  
 12:29:25 **13** of right?  
 12:29:26 **14** MR. WEINBERG: So, what I was trying to say was  
 12:29:29 **15** *Alice* is a procedural frame. Step two, step two is sort of  
 12:29:33 **16** just there to help you work through procedurally to get to  
 12:29:37 **17** the underlining question. The underlining question is the  
 12:29:40 **18** specificity that you need enough room for something else to  
 12:29:43 **19** improve upon what you did.  
 12:29:46 **20** *Alice* was a response to a long line of failures,  
 12:29:53 **21** I would say, from the Supreme Court starting in 1972,  
 12:29:56 **22** *Benson*, where they just didn't really grapple with what it  
 12:30:00 **23** means to have a software invention. And for a long time,  
 12:30:03 **24** the Patent Office was granting things that were just do it  
 12:30:06 **25** on a computer. Right.



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12:30:08 **1** And so, that's why *Alice* did have to say the  
 12:30:11 **2** goal of automation using a generic computer is -- that  
 12:30:18 **3** doesn't meet the specificity requirement. It didn't meet  
 12:30:20 **4** those terms.  
 12:30:21 **5** THE COURT: That's what I was going to say, what  
 12:30:22 **6** you said. I've always thought of it as like I thought of  
 12:30:24 **7** this whole unconventional use of computer technology piece  
 12:30:29 **8** as being about specificity, or particularity or concreteness  
 12:30:33 **9** to take us out of this result land or abstract idea land in  
 12:30:37 **10** the sense that, like, what the Courts were saying was, We're  
 12:30:41 **11** just going to say that adding do it on a computer or its  
 12:30:45 **12** equivalent is indistinguishable from claim-to-abstract idea.  
 12:30:50 **13** So, if you have claim-to-abstract idea and all  
 12:30:53 **14** you're adding is do it on a computer or words to that  
 12:30:57 **15** effect, it's indistinguishable from this. And the whole  
 12:31:03 **16** line of case law about are the adds, do they amount to the  
 12:31:07 **17** unconventional use of computer technology, is really about:  
 12:31:09 **18** Are they sufficiently specific enough to take us out of  
 12:31:12 **19** abstract idea land when it comes to computer-based patents.  
 12:31:15 **20** Do you think that's right or wrong?  
 12:31:17 **21** MR. WEINBERG: I think that's right.  
 12:31:17 **22** THE COURT: Okay.  
 12:31:18 **23** MR. WEINBERG: I think that's right. *Alice* was,  
 12:31:21 **24** I think, the first decision to say that this 101 exception  
 12:31:27 **25** root of it is the breadth of the claim, right. If you're

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12:31:32 **1** just trying to automate using a generic invention in a  
 12:31:39 **2** generic computer, that's not going to be enough to be more  
 12:31:42 **3** specific than just the abstract idea. So, that was in  
 12:31:45 **4** *Alice*, and that's -- you're absolutely right to have that.  
 12:31:48 **5** *Alice*, also, of course, had language about the  
 12:31:53 **6** conventional limitations, and that was expanded as its own  
 12:31:58 **7** set of case law. But what I was suggesting in the District  
 12:32:03 **8** Courts, for example, is that when you're saying that one  
 12:32:07 **9** limitation does not get you anywhere because it's generic, a  
 12:32:11 **10** generic computer, that comes from *Alice*, automation using a  
 12:32:14 **11** computer. There's no other way to automate, right. So,  
 12:32:17 **12** it's the generic. It's the parents. It's the genus.  
 12:32:18 **13** Whereas, the conventional limitation or  
 12:32:22 **14** exclusivity as such comes from. That's where it  
 12:32:26 **15** substantially more comes from. That's a different sort of  
 12:32:30 **16** attack on the claim limitations themselves.  
 12:32:34 **17** And so, just to be a little bit more specific  
 12:32:37 **18** when -- instead of saying, oh, it's all generic conventional  
 12:32:40 **19** activity that was always done and mush it all together, it  
 12:32:44 **20** may encourage more clear case law. I'm not sure.  
 12:32:50 **21** THE COURT: Okay. All right. Thank you,  
 12:32:51 **22** Mr. Weinberg. We'll leave it there.  
 12:32:52 **23** Thank you. Let me ask counsel for Emotive, what  
 12:32:59 **24** would you like to say?  
 12:33:00 **25** MR. MARTINELLI: I think I would like to respond

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12:33:01 **1** to this issue about computers in particular. And the issue  
 12:33:08 **2** you have with computers is they can do anything just by  
 12:33:12 **3** writing lines of code. And I think that's where a lot of  
 12:33:16 **4** this came from.  
 12:33:17 **5** And as somebody who earlier in my career drafted  
 12:33:20 **6** patents and had to actually grapple with what do you do when  
 12:33:24 **7** you write a patent, I sort of know how patent prosecutors  
 12:33:30 **8** think about things. And the way they think about it is just  
 12:33:35 **9** add words, right. Like I can just keep adding steps. And  
 12:33:39 **10** we used to have a thing, and it's funny, I was talking about  
 12:33:41 **11** a younger colleague of mine, and we had error limitations.  
 12:33:45 **12** And error limitations are you put in things in your computer  
 12:33:49 **13** claim like a memory talking to a processor or talking to  
 12:33:53 **14** whatever and you say like, well, yeah, that makes the claim  
 12:33:56 **15** look more robust, right, because I put in things that look  
 12:34:01 **16** specific, but --  
 12:34:02 **17** THE COURT: More words.  
 12:34:04 **18** MR. MARTINELLI: -- we laugh to ourselves and  
 12:34:06 **19** say, yeah, but that's all in there any way, but at least  
 12:34:09 **20** like I'm not having a claim that's one line or two lines  
 12:34:12 **21** that's just the function.  
 12:34:13 **22** And I think that's really what a lot of this,  
 12:34:17 **23** you know, post-Internet age 101 law is grappling with. It's  
 12:34:22 **24** should we be granting the patents to people that are just  
 12:34:25 **25** figuring out like functional ideas and things that are

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12:34:28 **1** real-world processes and applying them to this specific  
 12:34:32 **2** context and allow them to get a patent just because they put  
 12:34:37 **3** in enough words to get a patent?  
 12:34:39 **4** And that's why it's not necessarily about: Is  
 12:34:44 **5** this new or not? And novelty and obviousness sort of is a  
 12:34:49 **6** separate aspect.  
 12:34:50 **7** And so, I don't see specificity and technical  
 12:34:54 **8** improvement of the computer as two separate things. I think  
 12:34:58 **9** they're two different facets of really like looking at the  
 12:35:01 **10** same issue.  
 12:35:02 **11** And the issue is: Are you improving on the  
 12:35:05 **12** computer or did you just have a concept and say, you know,  
 12:35:09 **13** my client came to me with this business that they have. The  
 12:35:12 **14** business is just, you know, a new Internet company. I've  
 12:35:16 **15** got to write them a claim. And as a clever patent attorney,  
 12:35:20 **16** I'm going to just throw in as much computer words as I can  
 12:35:23 **17** so that can be an argument that I can do that. And that's  
 12:35:26 **18** why --  
 12:35:26 **19** THE COURT: If you had to say, like, what  
 12:35:28 **20** amounts to improving a computer, you know, like the easiest  
 12:35:37 **21** way, how do we know if we're improving the computer or  
 12:35:40 **22** improving how a computer works versus not? Well, the way  
 12:35:44 **23** you know that is blank.  
 12:35:45 **24** MR. MARTINELLI: Yeah, it's you look at the  
 12:35:47 **25** cases where they find that, and usually there's some new

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12:35:51 **1** computer technology that if you asked a programmer or if you  
 12:35:55 **2** asked a computer engineer: Is that interesting, they would  
 12:35:58 **3** say, yeah, as a computer engineer, as a software programmer,  
 12:36:04 **4** that's an interesting treat to me. It's not just me taking  
 12:36:08 **5** somebody's business plan and writing code to do it.  
 12:36:11 **6** So, if you look at things like *Enfish* where it's  
 12:36:14 **7** like, oh, no, entirely new programatic structure for doing,  
 12:36:19 **8** you know, analysis of this data or if you look at the claims  
 12:36:22 **9** where they talk about, oh, well, we're going to put -- I  
 12:36:25 **10** think your *Nielsen* case was like that, we're going to put  
 12:36:29 **11** two monitors or two probes, probes, monitors, sensors like  
 12:36:34 **12** in two different places.  
 12:36:35 **13** THE COURT: *Baylis* is a case that talks about  
 12:36:37 **14** sensors here and sensors here.  
 12:36:40 **15** MR. MARTINELLI: Right. So, I think that idea  
 12:36:43 **16** of specificity and technical innovation are both getting at  
 12:36:49 **17** the same nugget, which is we've created this tool, this  
 12:36:54 **18** computer that you may do anything, right. And there's --  
 12:36:58 **19** you come to me with any idea and I can write you code to do  
 12:37:01 **20** it.  
 12:37:02 **21** And so, are we going to give every single person  
 12:37:06 **22** a patent on moving some idea they have and embodying that  
 12:37:11 **23** idea in software code? That led to all of the dot.com cases  
 12:37:16 **24** in the early 2000s, and that's what all this 101 stuff was  
 12:37:20 **25** reacting to.

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12:37:21 **1** And so, the law says, No, let's look and see  
 12:37:24 **2** that you're actually doing something that's interesting from  
 12:37:25 **3** a technical perspective. And maybe you can do it because  
 12:37:28 **4** you're really getting down into the specificity and say, No,  
 12:37:32 **5** this specific thing is new and unique. I write a claim that  
 12:37:36 **6** really gets at what's new or you look at it and you say,  
 12:37:42 **7** Yeah, here's the concept. You know, maybe some of the  
 12:37:47 **8** shorter claims where they find this, here's the concept that  
 12:37:50 **9** is a new technical structure that gets to that concept.  
 12:37:53 **10** It's really like: What is technically interesting to  
 12:37:55 **11** computer people?  
 12:37:56 **12** THE COURT: And I think if it turns on that, you  
 12:37:58 **13** know, like is this an add -- is this add -- is this software  
 12:38:01 **14** add technically interesting enough for the computer to  
 12:38:03 **15** account for purposes of non-result, non-abstractness, the  
 12:38:06 **16** challenge at the Rule 12 stage, of course, is that we often  
 12:38:09 **17** don't have necessarily that declaration from that person  
 12:38:12 **18** saying yes or no. And sometimes it seems like what the  
 12:38:14 **19** courts are doing is: Well, what do we have? We've got the  
 12:38:16 **20** patent.  
 12:38:17 **21** So, they're trying to look for: Does the patent  
 12:38:19 **22** tell me whether a computer person might say that this is  
 12:38:23 **23** enough of an interesting add? And sometimes it seems like  
 12:38:26 **24** that's how the cases break.  
 12:38:28 **25** It's does the patent tell you enough to make you

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12:38:29 **1** think or give a hint that this is enough to count.  
 12:38:33 **2** MR. MARTINELLI: And, again, crafty-like --  
 12:38:35 **3** certainly, post-*Alice* crafty patent drafters will do the  
 12:38:38 **4** best that they can to try and make that case in the spec.  
 12:38:43 **5** And people know that they can do it. And when you look at  
 12:38:45 **6** the spec, if they don't have anything, right, if it's just,  
 12:38:48 **7** well, what am I really saying that's interesting, it's about  
 12:38:54 **8** the end result. It's not about the way I'm doing it. It's  
 12:38:58 **9** not about the thing that the computer programmer would think  
 12:39:01 **10** is interesting.  
 12:39:01 **11** That's a huge signal that you've got a 101  
 12:39:05 **12** issue. And, you know, post-*Alice*, you know, you go and you  
 12:39:10 **13** hammer at your client, and you say: What can you tell me?  
 12:39:13 **14** Like what did you do that's really interesting and that like  
 12:39:17 **15** a computer programmer would find interesting? And you try  
 12:39:19 **16** and get that in your spec and you try to put a big red flag  
 12:39:23 **17** on it and say that, Hey, this is something that's not  
 12:39:25 **18** abstract, and it is a real invention.  
 12:39:27 **19** THE COURT: Okay. We'll leave it there.  
 12:39:29 **20** Thank you, Mr. Martinelli.  
 12:39:32 **21** And I'll ask Postscript's counsel. Mr. Novikov.  
 12:39:32 **22** MR. NOVIKOV: I'll let Mr. Martinelli have the  
 12:39:36 **23** last word.  
 12:39:36 **24** THE COURT: Well, good enough. Counsel, thank  
 12:39:37 **25** you for your thoughts, both on these cases, which are

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12:39:41 **1** challenging, and then just on the law generally, which is  
 12:39:43 **2** also challenging.  
 12:39:44 **3** Okay. So just programmatically what we'll do,  
 12:39:48 **4** we'll take a break. It's about 12:40. I'll ask at least  
 12:39:51 **5** one representative for each party to be back in the room by  
 12:39:55 **6** 3:00 p.m. That's like a goal. I'm hopeful I could be back  
 12:40:00 **7** by 3:00. I'm positive I'll be back by 4:00, but it could be  
 12:40:06 **8** as early as 3:00. So, I'd like to have folks here in case  
 12:40:08 **9** we can get started that early.  
 12:40:10 **10** My goal will be to take what I heard, think  
 12:40:12 **11** about it, talk about it. My goal is to try to provide  
 12:40:16 **12** decision today on these motions, so the parties can have  
 12:40:19 **13** answers and they can use them as answers to move forward in  
 12:40:22 **14** the case. And I will plan to do that, attempt to do that.  
 12:40:27 **15** It's theoretically possible if I believe that  
 12:40:29 **16** what's been said today changes the equation in a way that I  
 12:40:32 **17** can't fairly do, that then I won't, but my goal will be to  
 12:40:37 **18** provide decisions then which I'll read orally to the  
 12:40:39 **19** parties. And then we'll conclude, and I think we should be  
 12:40:43 **20** concluding certainly no later than 5:00, perhaps before  
 12:40:47 **21** then.  
 12:40:47 **22** All right. So, we'll ask at least one  
 12:40:49 **23** representative, and certainly as many of you are welcome to  
 12:40:52 **24** come back as would like, from each party to be here by  
 12:40:55 **25** 3:00 p.m. And I'll try to have my clerk let you know if

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12:40:59 **1** we're going to be delayed. If it's not going to be 3:00, be  
 12:41:02 **2** closer to 4:00, I'll have my clerk let you know that. Let's  
 12:41:06 **3** assume we'll come back at 3:00, and I'll take the bench and  
 12:41:09 **4** make some decisions then.  
 12:41:10 **5** With all that said, the Court will stand in  
 12:41:12 **6** recess.  
 12:41:12 **7** DEPUTY CLERK: All rise.  
 01:08:25 **8** (Luncheon recess was taken.)  
 01:09:44 **9** DEPUTY CLERK: All rise.  
 03:01:06 **10** THE COURT: You can be seated. Good afternoon.  
 03:01:17 **11** From experience, I know I'm going to need a lot of water.  
 03:01:21 **12** So, all right. Let's go on the record.  
 03:01:24 **13** Thank you all, again, as we are back in court  
 03:01:26 **14** now, and I am prepared to render my decisions on the motions  
 03:01:31 **15** that were argued today in these various cases.  
 03:01:35 **16** So, as I begin this afternoon, let me first make  
 03:01:38 **17** a few introductory comments. Today I'll be providing  
 03:01:41 **18** decisions in these three cases orally here in court. For  
 03:01:45 **19** those decisions that I announce orally today, I also intend,  
 03:01:49 **20** for purposes of clarity and convenience, to later issue a  
 03:01:53 **21** written opinion on the docket. It is simply meant to  
 03:01:56 **22** transcribe what I've said here today and also to add  
 03:01:59 **23** relevant citations when needed.  
 03:02:02 **24** Although I'm issuing decisions orally today, I  
 03:02:05 **25** want to assure the parties that the process I've used to

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03:02:07 **1** assess these motions has been a rigorous one. I personally  
 03:02:11 **2** spent between 50 and a hundred hours of my time reviewing  
 03:02:14 **3** the briefs in these cases, analyzing the cases and record  
 03:02:18 **4** citations therein, and formulating these decisions, to say  
 03:02:22 **5** nothing of the time that my law clerks have spent on these  
 03:02:25 **6** matters as well.  
 03:02:26 **7** My oral decisions today, as you'll see in a  
 03:02:29 **8** minute, will be quite lengthy. And while length is not  
 03:02:33 **9** always an indicator of rigorous analysis, I hope that you'll  
 03:02:36 **10** conclude in these cases it is.  
 03:02:37 **11** Additionally, I should also note that I found  
 03:02:41 **12** there to be real efficiencies in holding argument in these  
 03:02:44 **13** various cases in which patent eligibility is challenged at  
 03:02:48 **14** one time, as we've done today. In many of the briefs across  
 03:02:52 **15** the cases, the same opinions from the United States Court of  
 03:02:55 **16** Appeals, from the Federal Circuit or from the Supreme Court  
 03:02:57 **17** of the United States have been cited. And having the  
 03:03:00 **18** experience of reading those decisions again and again over  
 03:03:03 **19** the span of the last few weeks has been very helpful for me.  
 03:03:07 **20** It helps to reinforce, in my mind, what the facts of those  
 03:03:10 **21** decisions really are and what aspects of those cases made a  
 03:03:13 **22** difference in their outcomes.  
 03:03:15 **23** It also helps me to see patterns across the  
 03:03:18 **24** various cases. And I've also benefited by being able to  
 03:03:24 **25** discuss issues regarding Section 101 law here today at oral

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03:03:25 **1** argument with a large number of excellent counsel  
 03:03:27 **2** representing all of these various parties. I thank all of  
 03:03:30 **3** you for your efforts today.  
 03:03:32 **4** The Courts often set out the relevant legal  
 03:03:35 **5** standards for review of a Section 101-related Rule 12(b)(6)  
 03:03:39 **6** motion at the pleading stage, including in the case of  
 03:03:42 **7** *Genedics, LLC vs. Meta Co.* The Court hereby incorporates by  
 03:03:47 **8** reference its discussion in *Genedics* of these legal  
 03:03:50 **9** standards and will follow the standards herein as to all the  
 03:03:54 **10** matters that I'll discuss today, unless otherwise noted.  
 03:03:58 **11** With that said, let me move on to the first case  
 03:04:01 **12** that I'll discuss, which was the case that was argued last  
 03:04:05 **13** today during our hearing. The first case in which I'll  
 03:04:09 **14** provide an opinion is British Telecommunications, *PLC vs.*  
 03:04:13 **15** *Palo Alto Networks, Inc.* It's Civil Action 22-1538-CJB.  
 03:04:20 **16** The Defendant, Palo Alto Networks, has filed a  
 03:04:22 **17** motion to dismiss pursuant to Rule 12(b)(6) arguing that the  
 03:04:26 **18** Complaint should be dismissed on Section 101-related subject  
 03:04:29 **19** matter eligibility rights.  
 03:04:31 **20** Here, Plaintiffs, British Telecommunications PLC  
 03:04:34 **21** and BT Americas, Inc. filed suit alleging the infringement  
 03:04:38 **22** of two patents, the United States Patent Number 7,159,237 or  
 03:04:44 **23** the '237 patent, and U.S. Patent Number 7,895,641, or the  
 03:04:49 **24** '641 patent.  
 03:04:50 **25** The patents are related. They share a common

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03:04:53 **1** specification, and they have the same title, which is  
 03:04:58 **2** "Method and System For Dynamic Network Intrusion Monitoring  
 03:05:01 **3** Detection and Response."  
 03:05:03 **4** The '237 patent, as we will see, contains  
 03:05:06 **5** certain representative claims. And so, I will focus on that  
 03:05:09 **6** patent alone here.  
 03:05:10 **7** The patent has 42 claims in total. While  
 03:05:15 **8** Defendant argues in its briefing that Claim 18 is  
 03:05:18 **9** representative for Section 101 purposes, not only the  
 03:05:22 **10** independent claims in that patent, but of all independent  
 03:05:24 **11** claims in both patents that are being asserted in this case.  
 03:05:28 **12** And Plaintiffs never explicitly disputed in the briefing  
 03:05:31 **13** that Claim 18 was representative of the other asserted  
 03:05:34 **14** independent claims.  
 03:05:36 **15** Claim 18 recites a security monitoring system  
 03:05:39 **16** for a computer network. The system utilizes a plurality of  
 03:05:43 **17** sensors, a secure operation center or SOC and at least one  
 03:05:48 **18** probe. And that probe is configured to do the following  
 03:05:52 **19** five things.  
 03:05:53 **20** First, to collect status data from at least one  
 03:05:56 **21** sensor that monitors at least one component of the network.  
 03:06:00 **22** Second, to analyze that status data, to identify  
 03:06:04 **23** potential security-related threats wherein the analysis  
 03:06:07 **24** includes an initial filtering process, and then an  
 03:06:11 **25** additional analysis of what the patents call "post-filtering

03:06:15 1 residue" which is data that is "either discarded nor  
 03:06:20 2 selected" by the initial filtering process.  
 03:06:23 3 Third, to transmit information about the  
 03:06:26 4 identified events to an analyst associated with the SOC.  
 03:06:31 5 Fourth, to receive feedback from an analyst  
 03:06:33 6 based on empirically-derived information reflecting the  
 03:06:36 7 operation of the security monitoring system.  
 03:06:38 8 And, fifth, to dynamically modify the analysis'  
 03:06:42 9 capability of a probe based on that received feedback.  
 03:06:45 10 In its briefing, to the extent that they ever  
 03:06:47 11 address a dependent claim in the patents, Plaintiffs mainly  
 03:06:50 12 focus on the requirement found in Claim 14 of the '237  
 03:06:54 13 patent that requires that the analyst at the SOC or the SOC,  
 03:06:59 14 otherwise, utilizes "cross-probe correlation."  
 03:07:03 15 This is seen, for example, on Pages 5 and 12 of  
 03:07:08 16 Plaintiff's answering brief in which they make reference to  
 03:07:10 17 Claim 14 and its computerized use of cross-probe  
 03:07:15 18 correlation.  
 03:07:15 19 And likening this, the Court will focus on  
 03:07:18 20 analyzing Claim 18 of the '237 patent, treating it as a  
 03:07:21 21 representative claim for all asserted independent claims.  
 03:07:24 22 And it will also address Claim 14 of that patent in that  
 03:07:28 23 Plaintiffs have suggested that that claim is representative  
 03:07:30 24 of any dependent claims that discuss the addition of  
 03:07:34 25 cross-probe correlation or its equivalent.

03:07:36 1 Moreover, as a general matter, when the Court is  
 03:07:39 2 discussing the specification of one of the two asserted  
 03:07:41 3 patents, it will make use of the '237 patent specification  
 03:07:45 4 understanding that that specification is a little different  
 03:07:48 5 from the '641 patent specification.  
 03:07:52 6 In step one, Defendant argues that the asserted  
 03:07:54 7 claims are directed to the abstract idea of "collecting,  
 03:07:57 8 filtering, analyzing and transmitting data and then making  
 03:08:02 9 modifications based on human feedback."  
 03:08:04 10 Plaintiffs don't contest in their briefing that  
 03:08:07 11 the purported abstract idea here is, in fact, an abstract  
 03:08:11 12 idea, and the Court concludes that it is. A claim to an  
 03:08:14 13 abstract idea has been described by the Federal Circuit as  
 03:08:17 14 one directed to "a disembodied concept, a basic building  
 03:08:22 15 block of human ingenuity untethered from any real-world  
 03:08:26 16 application." The Defendant's proffered abstract idea seems  
 03:08:30 17 to fit that characterization.  
 03:08:31 18 Moreover, the Federal Circuit has explained that  
 03:08:33 19 certain basic methods of utilizing data like these, standing  
 03:08:38 20 alone, cannot amount to something more than an abstract  
 03:08:41 21 idea. For example, in *International Business Machines Corp.*  
 03:08:47 22 *Vs. Zillow Group, Inc.*, the Federal Circuit said that,  
 03:08:50 23 "Identifying, analyzing and presenting certain data to a  
 03:08:53 24 user is not an improvement specific to a computer." And  
 03:08:56 25 that "claims directed to collection of information

03:09:00 1 comprehending the meaning of that collected information and  
 03:09:03 2 indication of the results all in a generic network computer  
 03:09:07 3 operating in its normal expected manner" are claims directed  
 03:09:11 4 to an abstract idea.  
 03:09:14 5 In *Electric Power Group, LLC vs. Alstom, S.A.*,  
 03:09:17 6 the Federal Circuit said that, "Nearly requiring the  
 03:09:19 7 selection and manipulation information by itself does not  
 03:09:23 8 transform" an otherwise abstract idea into something more.  
 03:09:27 9 In cases like *BASCOM Global Internet Services,*  
 03:09:30 10 *Inc. vs. AT&T Mobility, LLC*, the Federal Circuit noted that  
 03:09:35 11 "filtering content is an abstract idea because it is a  
 03:09:38 12 long-standing, well-known method of organizing human  
 03:09:40 13 behavior, similar to concepts previously found to be  
 03:09:45 14 abstract."  
 03:09:45 15 And in, *In Re: Rosenberg*, the Federal Circuit  
 03:09:48 16 explained that the idea of determining whether to "fine  
 03:09:53 17 tune" a system, including by providing instructions to  
 03:09:56 18 modify certain procedures or parameters amounts to an  
 03:09:59 19 abstract idea.  
 03:10:00 20 So, we know that if it's right to say that all  
 03:10:02 21 these claims are directed to this collecting data and or  
 03:10:06 22 analyzing data, and or filtering data, and or transmitting  
 03:10:10 23 data and or modifying data based on analysis, well that  
 03:10:14 24 cannot be enough to save the claims in step one.  
 03:10:17 25 But Plaintiffs contend that the '237 patent is

03:10:19 1 not actually directed to the broad abstract idea issued here  
 03:10:23 2 and says is directed to something more particularized. On  
 03:10:26 3 that score in their briefing, Plaintiffs assert that the  
 03:10:29 4 claims are directed to "a specific architecture for  
 03:10:32 5 detecting and responding to new and constantly evolving  
 03:10:35 6 attacks on computer networks."  
 03:10:38 7 What is this more specific architecture that  
 03:10:41 8 Plaintiffs speak of? Essentially in places like Pages 3 to  
 03:10:44 9 6 of their answering brief or in Paragraph 27 of their  
 03:10:48 10 Complaint and, again, in oral argument here today,  
 03:10:50 11 Plaintiffs have focused most directly on three different  
 03:10:53 12 aspects of the claims.  
 03:10:54 13 First, they note that the claim systems and  
 03:10:56 14 methods utilize a "tiered analysis" at the probe. By this  
 03:11:01 15 they mean that first a probe uses "two different types of  
 03:11:05 16 filters" to assess status data, a positive and negative  
 03:11:10 17 filter that selects or discards data respectfully.  
 03:11:13 18 And, second, that the probe then separately  
 03:11:15 19 analyzes a middle ground type of data that has never been  
 03:11:18 20 selected or discarded -- that has neither been selected or  
 03:11:21 21 discarded by the filter, what the patents refer to as  
 03:11:24 22 post-filtering residue.  
 03:11:25 23 Second, Plaintiffs highlight that the claimed  
 03:11:28 24 systems and methods also use a "two-level review process"  
 03:11:32 25 and that a computerized analysis of this data occurs first

03:11:36 **1** at the probe level. But then the information gleaned about  
 03:11:39 **2** potential security-related events is sent to a human analyst  
 03:11:42 **3** for further review.  
 03:11:43 **4** And, third, Plaintiffs know that in certain  
 03:11:45 **5** dependent claims like Claim 14, they require that the  
 03:11:48 **6** analysis performed at the SOC involves electronic  
 03:11:53 **7** cross-probe correlation, which the Court understands to mean  
 03:11:55 **8** that, as Plaintiffs suggested in briefing, the system takes  
 03:11:58 **9** into account and analyzes status data obtained from multiple  
 03:12:02 **10** different probes, not just a single probe.  
 03:12:04 **11** The directed to inquiry in step one applies a  
 03:12:09 **12** stage one filter to claims considered in light of the  
 03:12:10 **13** specification, based on whether their character as a whole  
 03:12:14 **14** or their focus is directed to exclude subject matter. As to  
 03:12:17 **15** how that inquiry should proceed, the Federal Circuit  
 03:12:20 **16** provides some guidance in *Internet Patents Corp. vs. Active*  
 03:12:24 **17** *Network, Inc.*  
 03:12:25 **18** There, in order to ascertain at step one whether  
 03:12:27 **19** the claim's character as a whole was directed to an abstract  
 03:12:30 **20** idea, the Internet Patents Court examined the specification  
 03:12:34 **21** of the patent at issue. In doing so, it cited to what the  
 03:12:36 **22** patentee described in the specification as the "innovation  
 03:12:40 **23** over the prior art" and the "central, most important aspect"  
 03:12:46 **24** of the patent.  
 03:12:46 **25** The Federal Circuit has also stated, however,

03:12:49 **1** that reliance on the specification must always yield to the  
 03:12:52 **2** claim language in identifying what a claim is directed to,  
 03:12:55 **3** because the concern that derives the judicial exception to  
 03:13:00 **4** patentability is one of preemption. And the claim language  
 03:13:03 **5** defines the breadth of each claim.  
 03:13:05 **6** In order to attack this step one question, then  
 03:13:08 **7** the Court needs to determine: What is the focus of  
 03:13:11 **8** representative Claims 8 and -- 18 and 14 of the '237 patent.  
 03:13:16 **9** In looking at the patent specification, it's pretty clear  
 03:13:19 **10** that some aspects of the specific architecture touted by  
 03:13:23 **11** Plaintiffs are not what the patent itself is saying it's  
 03:13:26 **12** particularly focused on.  
 03:13:27 **13** For example, it's, of course, true that Claim 18  
 03:13:30 **14** and Claim 14 include reference to, first, how the probe  
 03:13:34 **15** separately analyzes post-filtering residue after the initial  
 03:13:37 **16** filtering stage has occurred.  
 03:13:39 **17** And, second, the analysis of status data by way  
 03:13:42 **18** of cross-probe correlation.  
 03:13:44 **19** But when one reads the patent, one sees that  
 03:13:46 **20** those post-filtering residue and cross-probe correlation  
 03:13:50 **21** concepts are actually little mentioned in the specification.  
 03:13:53 **22** For example, the only time the specification mentions the  
 03:13:55 **23** concept of analyzing post-filtering residue comes in  
 03:13:58 **24** Column 8. Therein a description of an exemplary embodiment  
 03:14:03 **25** found in Figure 2. The patent explains that after the

03:14:06 **1** system first filters the status data, using a negative  
 03:14:09 **2** filter and subsystem and a positive filtering subsystem  
 03:14:12 **3** which selects "possibly interesting information" and  
 03:14:16 **4** forwards it on to the SOC.  
 03:14:17 **5** Then, "data neither discarded by the negative  
 03:14:20 **6** filtering subsystem nor selected out as interesting by the  
 03:14:24 **7** positive filtering subsystem, form the residue, which is  
 03:14:28 **8** sent to anomaly engine 2050 for further analysis. Anomaly  
 03:14:32 **9** engine 2050 determines what residue information may be  
 03:14:36 **10** worthy of additional analysis and sends such information"  
 03:14:39 **11** for forwarding to the SOC.  
 03:14:41 **12** And so far as the Court is aware, the only time  
 03:14:43 **13** the specification makes reference to the idea of cross-probe  
 03:14:45 **14** correlation comes in a few lines in Column 2 and Column 3.  
 03:14:50 **15** In Column 2, for example, the patent states that,  
 03:14:53 **16** "Furthermore, data filtering and analysis can include  
 03:14:56 **17** cross-product analysis, which allows the probe sentry system  
 03:14:59 **18** to correlate and recognize such multiple sensor readings as  
 03:15:03 **19** reflecting the same pattern. Such features ensure that the  
 03:15:07 **20** invention is capable of the rapid refinement necessary to  
 03:15:10 **21** combat inquiry attacks".  
 03:15:12 **22** Additionally, there's a brief reference to  
 03:15:14 **23** "cross-correlation" and "cross-analysis" in Column 3 of the  
 03:15:19 **24** patent. But in general, the specification indicates that  
 03:15:23 **25** the patent's focus or its character as a whole is not really

03:15:27 **1** attuned to those two concepts where they're used in some  
 03:15:27 **2** accomodation.  
 03:15:31 **3** Instead, the patent reads as if its focus is  
 03:15:34 **4** instead on the general concept of filtering and analyzing  
 03:15:37 **5** status data and doing so via the two-level review process  
 03:15:40 **6** that Plaintiffs spoke of in their briefing. In other words,  
 03:15:44 **7** having one computerized review process occur at the probe  
 03:15:48 **8** and then another human analyst based review process occur at  
 03:15:51 **9** the SOC.  
 03:15:52 **10** That the patent's focus is on this two-level  
 03:15:54 **11** review process is seen first by looking at the abstract.  
 03:15:57 **12** There the patent explains that the inventions described  
 03:16:00 **13** therein are about how "a probe attached to a customer's  
 03:16:03 **14** network collects status data and other audit information  
 03:16:07 **15** from monitored components of the network looking for  
 03:16:10 **16** footprints or evidence of unauthorized intrusions or attack.  
 03:16:13 **17** The probe filters and analyzes the collected data to  
 03:16:16 **18** identify potentially security-related events happening on  
 03:16:19 **19** the network, identify events that are transmitted to human  
 03:16:22 **20** analysts" for problem resolution."  
 03:16:25 **21** After discussing the types of resources that a  
 03:16:27 **22** human analyst might use, the abstract concludes by noting  
 03:16:30 **23** the feedback from the analyst: "Problem resolution evidence  
 03:16:34 **24** can be used to update the knowledge base available to  
 03:16:36 **25** analysts for future attacks and to update the filtering and



03:16:40 **1** analysis capabilities of the probe in other systems."  
 03:16:43 **2** There's no specific mention there of analyzing  
 03:16:46 **3** post-filtering residue or the use of cross-probe  
 03:16:49 **4** correlation, for example. So, too, in the patent's  
 03:16:52 **5** Background of the Invention section. There, the patent  
 03:16:55 **6** explains how hierarchal computer and network security  
 03:16:58 **7** products like firewalls for authentication mechanisms or  
 03:17:01 **8** encryption were focused on preventing outside intrusion into  
 03:17:05 **9** an internal network. But the patent explains that because  
 03:17:07 **10** those computerized processes don't always work perfectly,  
 03:17:11 **11** it's also helpful to have "monitoring detection and response  
 03:17:15 **12** in the event of a breach."  
 03:17:17 **13** That said, the patent explains that system  
 03:17:19 **14** administrators cannot easily play its additional monitoring  
 03:17:23 **15** role, and that they "normally do not have the time or  
 03:17:25 **16** ability to read through large amounts of constantly updating  
 03:17:29 **17** audit information looking for attacks on their systems."  
 03:17:32 **18** "They also do not have the time to continuously  
 03:17:34 **19** monitor hacker activities looking out for new tactics, tools  
 03:17:37 **20** and trends."  
 03:17:38 **21** "Finally, they don't have the time to become  
 03:17:40 **22** experts on every kind of intrusion and to maintain that  
 03:17:43 **23** expertise."  
 03:17:45 **24** Therefore, here the patent concludes by noting  
 03:17:47 **25** that what's needed is a system that both employs "automatic

03:17:52 **1** defenses" that work against automated attacks, but that also  
 03:17:55 **2** utilizes "human intelligence" and that "takes advantage of  
 03:18:00 **3** security intelligence and other knowledgeable databases" in  
 03:18:04 **4** order to provide "the kind of intelligent defense offered by  
 03:18:08 **5** the present invention."  
 03:18:09 **6** In other words, here the patent seems to be  
 03:18:11 **7** saying that its focus is on providing the two-level review  
 03:18:14 **8** process. One part computer based, one part human based that  
 03:18:18 **9** Plaintiffs speak of.  
 03:18:20 **10** This conclusion is also borne out in reviewing  
 03:18:23 **11** The Summary of The Invention section of the patent. As the  
 03:18:25 **12** Court's noted, there are a few brief references in Columns 2  
 03:18:27 **13** and 3 in that section to the benefit of the systems taking  
 03:18:30 **14** into account cross-probe correlation. But the entirety of  
 03:18:34 **15** the rest of the section which spans Columns 2 through 4 is  
 03:18:37 **16** really talking at a high level about the benefits of a  
 03:18:40 **17** two-level system for intrusion detection, one that  
 03:18:42 **18** incorporates the work of a probe or sentry system that  
 03:18:45 **19** filters data and does a preliminary threaded analysis. And  
 03:18:48 **20** one that also incorporates human analysts to further sift  
 03:18:52 **21** through that data and provide feedback. And this section  
 03:18:54 **22** doesn't mention specifically the particular benefit of  
 03:18:56 **23** having the probe select out and then separately review  
 03:19:00 **24** post-filtering residue even once.  
 03:19:02 **25** So, this all begs the question: If the patent's

03:19:04 **1** focused on the use of a two-level system for detecting  
 03:19:07 **2** security threats, does that concept amount only to simply  
 03:19:11 **3** "collecting, filtering, analyzing and transmitting data and  
 03:19:14 **4** then making modifications based on human feedback?"  
 03:19:18 **5** For our purposes here, and the Court will assume  
 03:19:21 **6** arguably, yes. The Court will take this path because these  
 03:19:24 **7** portions of the patent seem to be telling us that what the  
 03:19:26 **8** claim is about is that having the computerized probe filter  
 03:19:30 **9** status data and analyze it, and then later having a human do  
 03:19:33 **10** a second-level set of analysis of certain data that's been  
 03:19:36 **11** passed along.  
 03:19:36 **12** There's nothing more in the claims about how the  
 03:19:39 **13** probe or the human analyst must do that filtering analysis  
 03:19:42 **14** or what type of feedback or modifications must be provided  
 03:19:46 **15** by the analyst. Moreover, a way of assessing whether claims  
 03:19:50 **16** directed to an abstract idea is to ask whether the claim is  
 03:19:53 **17** directed to an improvement in computer functionality, or  
 03:19:56 **18** instead, the computer is simply being used as tools to aid  
 03:19:59 **19** in carrying out the abstract idea itself.  
 03:20:02 **20** And here, there's no other indication in the  
 03:20:04 **21** patent that either of these two high-level levels of review  
 03:20:07 **22** of status data implemented improvement to the way that  
 03:20:11 **23** computers work. For example, Plaintiffs don't contend that  
 03:20:13 **24** the claim's use of computer-based positive and negative  
 03:20:16 **25** filter or analysis in any way represents a new computerized

03:20:20 **1** method of performing this type of work. Indeed, in  
 03:20:24 **2** Column 8, the patent suggests that it's not.  
 03:20:26 **3** Moreover, as was noted above in the Court's  
 03:20:28 **4** discussion of Background of The Invention section of the  
 03:20:30 **5** patent, the patent explains that the role of the human  
 03:20:33 **6** analyst is to allow the claim system to engage in the type  
 03:20:36 **7** of data analysis that a human can do, but the system  
 03:20:39 **8** administrators simply don't have the time to do, since they  
 03:20:42 **9** can't "read through large amounts of constantly updated  
 03:20:45 **10** audit information."  
 03:20:47 **11** As Defendant noted in its opening brief, this is  
 03:20:50 **12** "not an improvement to computer functionality. It simply  
 03:20:53 **13** supplements one human, the administrator, with another, an  
 03:20:56 **14** analyst."  
 03:20:57 **15** Now, the Court doesn't necessarily agree with  
 03:21:01 **16** Defendant's contention that the patent is directed solely to  
 03:21:03 **17** a "human solution not a technical solution." It would be  
 03:21:07 **18** more accurate to say, with its focus on this two-level  
 03:21:10 **19** review of status data, the patent's directed to the  
 03:21:13 **20** combination of a human solution and a computer-based  
 03:21:17 **21** solution. But when describing claiming this two-level  
 03:21:20 **22** solution, it's as if the patent simply said that it was  
 03:21:23 **23** claiming the following idea: Use a computer to filter and  
 03:21:28 **24** analyze status data in a manner indistinguishable to how  
 03:21:31 **25** computers already do this and then use a human to further

03:21:33 **1** analyze status data and provide some feedback on it, nothing  
 03:21:37 **2** more.  
 03:21:37 **3** It's difficult to see how this combined concept  
 03:21:40 **4** that broadly, which simply seems to be about layering  
 03:21:43 **5** together two broad ways of collecting, filtering and  
 03:21:47 **6** analyzing data in order to provide feedback, is meaningfully  
 03:21:50 **7** different from the Defendants' articulation of the abstract  
 03:21:53 **8** idea. And so, the Court agrees, for our purposes here, that  
 03:21:56 **9** the claims are directed to the proffered abstract idea in  
 03:22:01 **10** Alice's step one.  
 03:22:02 **11** I now turn to step two of the Alice framework.  
 03:22:05 **12** At step two, the Courts are required to assess what else is  
 03:22:08 **13** in the claim, beyond the abstract idea, in order to  
 03:22:11 **14** determine whether the additional elements in the claim,  
 03:22:14 **15** either viewed independently or as an ordered combination,  
 03:22:17 **16** transform the nature of the claim into a patent eligible  
 03:22:20 **17** application of the abstract idea.  
 03:22:22 **18** With respect to computer functionality based  
 03:22:27 **19** claims, like those at issue here, the Federal Circuit has  
 03:22:29 **20** stated that such claims can include an inventive concept  
 03:22:33 **21** where they provide a technological solution to a  
 03:22:36 **22** technological problem.  
 03:22:38 **23** At step two, for the role of the computer to be  
 03:22:40 **24** meaningful in the context of the Section 101 analysis, it  
 03:22:43 **25** must involve more than the performance of well-understood

03:22:45 **1** routine and conventional activities previously known in the  
 03:22:49 **2** industry. I will say that I think the step two question  
 03:22:52 **3** here was a difficult one to resolve. Reasonable minds could  
 03:22:55 **4** disagree about how one should come out.  
 03:22:58 **5** Let me explain, though, why I am determining  
 03:23:00 **6** that the record indicates the presence of a factual disputed  
 03:23:04 **7** step two sufficient to warrant denial of the Defendant's  
 03:23:06 **8** motion. At times in the briefing and in the Complaint, such  
 03:23:10 **9** as in Paragraph 29 of the Complaint, Plaintiffs note that  
 03:23:15 **10** claim systems and methods amounted to a "novel"  
 03:23:17 **11** architecture for unearthing and addressing network  
 03:23:20 **12** intrusions.  
 03:23:20 **13** And the Court must accept those allegations of  
 03:23:22 **14** novelty as true at the pleading stage, but that alone  
 03:23:25 **15** wouldn't be enough to get Plaintiffs over the hump at  
 03:23:28 **16** step two. That's because there's a difference between the  
 03:23:30 **17** concept of novelty and patent eligibility in the patent.  
 03:23:34 **18** The Federal Circuit's explained that whether a  
 03:23:35 **19** particular element or combination of elements is novel  
 03:23:38 **20** doesn't necessarily note whether that element's patent  
 03:23:41 **21** eligible.  
 03:23:42 **22** Put differently, as the Federal Circuit stated  
 03:23:43 **23** in its *Synopsys, Inc. vs. Mentor Graphics*, a claim for a new  
 03:23:49 **24** abstract idea is still an abstract idea. Nor the Court's  
 03:23:52 **25** view is there any indication that any of the remaining

03:23:55 **1** components of the representative claims, were they standing  
 03:23:58 **2** alone, would amount to anything other than use of generic  
 03:24:01 **3** computer components to perform well-known computer  
 03:24:04 **4** functions.  
 03:24:05 **5** Claim 18, for example, utilizes sensors, a  
 03:24:07 **6** secure operation center and at least one probe. But as the  
 03:24:11 **7** Defendant notes, the patent tells us at Column 4 that any  
 03:24:14 **8** such technology utilizing those claim elements, it was well  
 03:24:17 **9** known and commercially available. So, the use of these  
 03:24:19 **10** computer hardware based limitations in the claims do little  
 03:24:22 **11** more than spell out what it means to apply the abstract idea  
 03:24:25 **12** on a computer.  
 03:24:26 **13** Moreover, Plaintiff's additional step of  
 03:24:28 **14** analyzing post-filtering residue appears to make use of,  
 03:24:31 **15** according to Column 8 of the patent, a type of well-known  
 03:24:35 **16** data discrimination analysis. And Claim 14's reference to  
 03:24:39 **17** the use of cross-probe correlation is not suggested on its  
 03:24:42 **18** own to be a new use of computer technology.  
 03:24:45 **19** That said, we also note from the Federal  
 03:24:47 **20** Circuit's decision in *BASCOM* that the claim's use of an  
 03:24:50 **21** ordered combination of otherwise known conventional elements  
 03:24:54 **22** can still amount to an inventive concept in step two. And  
 03:24:58 **23** in the Court's view, there is just enough in the record to  
 03:25:01 **24** render it plausible that the representative claims included  
 03:25:04 **25** inventive concept by way of their use of an ordered

03:25:07 **1** combination of known elements in an unconventional way as  
 03:25:11 **2** part of the claim security system amendments.  
 03:25:14 **3** Here, it's the claim's combination of the  
 03:25:17 **4** two-level review process with the added more specific step  
 03:25:21 **5** of having the computer probe than additionally analyzed  
 03:25:24 **6** post-filtering residue. Plus, in at least some dependent  
 03:25:29 **7** claims, the computer's additional use of data obtained from  
 03:25:31 **8** multiple probes that could represent the requisite ordered  
 03:25:35 **9** combination of elements.  
 03:25:36 **10** Of course, one might say, as Defendant does,  
 03:25:39 **11** that the claim's additional assessment of post-filtering  
 03:25:42 **12** residue or the correlation of status data from multiple  
 03:25:45 **13** probes is just another way of piling the use of one abstract  
 03:25:48 **14** idea on to another. In other words, one could argue that  
 03:25:50 **15** the second post-filtering residue analysis step is just  
 03:25:54 **16** another way of saying analyze data or that the cross-probe  
 03:25:58 **17** correlation step is just another way of saying correlate  
 03:26:01 **18** data, and that both of those things are just additional ways  
 03:26:03 **19** to make use of abstract ideas.  
 03:26:05 **20** And one could also argue, as Defendant does,  
 03:26:08 **21** that claims do not tell us any more about how the claim  
 03:26:11 **22** systems or methods analyze post-filtering residue or how  
 03:26:14 **23** they correlate information from different probes, such that  
 03:26:18 **24** the addition of those other steps cannot provide an  
 03:26:21 **25** inventive concept.

03:26:22 **1** And it's true, the claims don't provide this  
 03:26:24 **2** additional indication of how the systems or methods do this  
 03:26:26 **3** particular work. Moreover, they certainly don't describe  
 03:26:28 **4** some further technical means for performing these functions.  
 03:26:33 **5** But the Court is not completely convinced that the way  
 03:26:36 **6** Defendant is looking at these issues is the right way to do  
 03:26:38 **7** so for purposes of its review here.  
 03:26:41 **8** A couple of cases from the Federal Circuit  
 03:26:44 **9** convince the Court that this is so. Particularly, one. And  
 03:26:49 **10** there the Court looks to the Federal Circuit's decision in  
 03:26:51 **11** *SRI International, Inc. vs. Cisco Systems, Inc.*, the case  
 03:26:55 **12** that Plaintiffs have identified as the most analogous  
 03:26:58 **13** Federal Circuit opinion to this case. The Court agrees with  
 03:27:02 **14** Plaintiffs that SRI, although it was decided at the step one  
 03:27:05 **15** stage not at step two, is very helpful to their argument  
 03:27:08 **16** here.  
 03:27:09 **17** In SRI, the representative claim was to a  
 03:27:11 **18** computer-automated method of hierarchically event monitoring  
 03:27:15 **19** and analysis within a network. The claims preformed this  
 03:27:18 **20** method by, first, deploying more than one network monitor to  
 03:27:22 **21** detect suspicious activity based on analysis of at least one  
 03:27:25 **22** of certain categories of network trafficking.  
 03:27:28 **23** Second, by having those monitors generate  
 03:27:30 **24** reports of suspicious activity.  
 03:27:32 **25** And, third, by having those reports be received

03:27:34 **1** or integrated by one or more of the monitors.  
 03:27:38 **2** At step one, the SRI Court found that the claim  
 03:27:40 **3** was not simply directed to the abstract idea of collecting  
 03:27:43 **4** and analyzing data. This was even though the steps of the  
 03:27:46 **5** claims were fairly basic and functional in the requirements  
 03:27:50 **6** in that one aspect of it simply required an analysis of  
 03:27:53 **7** network trafficking. And another simply required that the  
 03:27:56 **8** monitors "generate reports."  
 03:27:58 **9** And a third only said that the monitors must be  
 03:28:01 **10** "receiving and integrating reports," nothing more. Yet, the  
 03:28:05 **11** SRI Court didn't conclude that this method, the claims were  
 03:28:08 **12** simply about collecting and analyzing data. Instead, in  
 03:28:12 **13** determining that the claims, nevertheless, were directed to  
 03:28:15 **14** something more, the Court looked at the patent  
 03:28:17 **15** specification. The specification explained that the claimed  
 03:28:20 **16** invention solved weaknesses in conventional networks in  
 03:28:23 **17** order to fix a technological problem and provide a  
 03:28:27 **18** "framework for the recognition of more global threats,  
 03:28:31 **19** inter-domain connectivity, including coordinated attempts to  
 03:28:35 **20** infiltrate or destroy connectivity across an entire  
 03:28:36 **21** network."  
 03:28:38 **22** This was enough to ensure the Court that the  
 03:28:40 **23** computers used in the claim were not added simply "as a  
 03:28:43 **24** tool" to automate conventional activity, but instead were  
 03:28:46 **25** claims that improved the functionality of the computers and

03:28:49 **1** computer networks themselves.  
 03:28:51 **2** The *SRI* Court came to this conclusion, even  
 03:28:54 **3** though the claim did not specify how the network monitors  
 03:28:58 **4** detected suspicious activity or analyzed data beyond the  
 03:29:01 **5** requirement that they use at least one of the categories  
 03:29:04 **6** that they had mentioned in the claim, or how they generated  
 03:29:07 **7** reports of suspicious activity, or how they received and  
 03:29:12 **8** integrated those reports.  
 03:29:12 **9** Despite this, *SRI* concluded that the claims were  
 03:29:15 **10** directed to what is called a "specific technique"  
 03:29:18 **11** "utilizing" -- "using a plurality of network monitors that  
 03:29:23 **12** each analyzed specific types of data on the net and  
 03:29:26 **13** integrating reports from the monitors to solve a  
 03:29:30 **14** technological problem arising in computer networks,  
 03:29:33 **15** identifying hackers or potential intruders to the network."  
 03:29:37 **16** Now, unlike in *SRI*, as I've noted above, the  
 03:29:39 **17** patent specification doesn't say a lot about the claim's  
 03:29:43 **18** additional use of the probes to analyze post-filtering  
 03:29:46 **19** residue or the claim's use of data for multiple probes and  
 03:29:49 **20** how, when combined with the two-level filtering analysis  
 03:29:53 **21** process, this might amount to an unconventional use of  
 03:29:56 **22** computer technology.  
 03:29:57 **23** And as the Court mentioned, there are some  
 03:29:59 **24** references in the specification to these additional concepts  
 03:30:02 **25** in Columns 2, 3 and 8, but they're certainly not highlighted

03:30:05 **1** or described in a really fulsome manner. That said, the  
 03:30:09 **2** Complaint does fill in some of these blanks.  
 03:30:11 **3** Paragraph 38 of the Complaint is particularly  
 03:30:12 **4** relevant. Therein, Plaintiffs state that the architecture  
 03:30:16 **5** of the patent was "novel and unconventional." And in  
 03:30:19 **6** explaining why that was so, they cite to the examiner's  
 03:30:22 **7** Notice of Allowability regarding the '237 patent. Therein,  
 03:30:25 **8** the examiner stated that, Typically network security systems  
 03:30:29 **9** "all data is filtered by intrusion detection, firewall,  
 03:30:33 **10** gateway, proxy, sensor, probe, or sentry or some other type  
 03:30:36 **11** of device," such that if "an attack occurs, the data is  
 03:30:40 **12** transmitted for further analysis."  
 03:30:43 **13** The examiner noted that in such systems "all  
 03:30:45 **14** other data is usually blocked or discarded." The Notice of  
 03:30:51 **15** Allowability also states that "prior art does not disclose  
 03:30:53 **16** or suggest data to be either discarded by a negative or  
 03:30:56 **17** positive is the residue that is sent for further analysis."  
 03:31:00 **18** The Court understands this to be an indication that while it  
 03:31:02 **19** was conventional for intrusion detection systems to use a  
 03:31:07 **20** filtering system like that described in the claims -- that  
 03:31:09 **21** is, one that filters status data into positive or negative  
 03:31:15 **22** categories to be either further reviewed, because it's known  
 03:31:17 **23** to be threatening or otherwise discarded -- those systems  
 03:31:20 **24** were not using probes to then additionally further analyze  
 03:31:23 **25** data that fell somewhere in between those two poles or what

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03:31:27 **1** the patents here describe as "residue" data.  
 03:31:29 **2** Additionally, Paragraph 38 of the Complaint  
 03:31:31 **3** states that the computer-based use of and correlation of  
 03:31:34 **4** data from different probes was also "a significant  
 03:31:38 **5** improvement to existing computer security technology at the  
 03:31:41 **6** time." In that, "previous conventional security systems  
 03:31:45 **7** were constrained to pattern matching at a single point in  
 03:31:49 **8** the network."  
 03:31:50 **9** So, as in *SR*, here the record provides at least  
 03:31:53 **10** some, not a lot, but at least some factual support for the  
 03:31:58 **11** idea that the claims could contain a specific solution to a  
 03:32:02 **12** problem faced in the computer's network security field, and  
 03:32:05 **13** that the solution is at least significant, though not  
 03:32:08 **14** exclusively, rooted in computer technology.  
 03:32:12 **15** That so, as in *SR*, even though the claims don't  
 03:32:16 **16** specify every detail of how the claimed systems in the  
 03:32:20 **17** patents protect against network intrusion. And as in *SR*,  
 03:32:23 **18** even though the claims looked at one mode, it might be said  
 03:32:26 **19** to simply be about collecting, and filtering and analyzing  
 03:32:30 **20** data. It seems like that may not be the right way to view  
 03:32:35 **21** it at step two. Instead, it seems like the claims could be,  
 03:32:37 **22** maybe should be viewed, at least at the pleading stage, as  
 03:32:41 **23** plausibly employing a "specific technique" to assess status  
 03:32:45 **24** data, one that utilizes a partly computerized, two-level  
 03:32:49 **25** filtering system and uses the computerized probe to

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03:32:52 **1** additionally assess residue data in combination with that  
 03:32:55 **2** two-level system in a way that wasn't being done before.  
 03:32:58 **3** And that, also, in some dependent claims makes use of data  
 03:33:03 **4** for multiple probes in a way that computerized programs  
 03:33:06 **5** weren't doing.  
 03:33:06 **6** One last point about *SR*. Defendant knows that  
 03:33:10 **7** one of the justifications, though not the only one that the  
 03:33:13 **8** Federal Circuit used in that case to support its decision,  
 03:33:16 **9** was that the Court tended to agree with the Plaintiff that  
 03:33:19 **10** "the human mind is not equipped to detect suspicious  
 03:33:22 **11** activity by using network monitors and analyzing network  
 03:33:26 **12** packets as recited by the claims."  
 03:33:28 **13** And Defendant contrasts that with the scenario  
 03:33:31 **14** here, arguing that it is clear from the record that the  
 03:33:33 **15** human mind is equipped to do everything that Claim 18 can do  
 03:33:37 **16** in a similar way that a non-human could do. Obviously, some  
 03:33:41 **17** elements of Claim 18 do involve a human analyst, so it seems  
 03:33:45 **18** hard to dispute Defendant's contention as to those elements.  
 03:33:48 **19** But the claim does have other elements such as the probe's  
 03:33:50 **20** use of positive and negative filtering.  
 03:33:53 **21** Now, it may be the case that a human could play  
 03:33:55 **22** that filtering role in a similar way to what the probe does  
 03:33:57 **23** here, but I don't have a great record to support that  
 03:34:00 **24** assertion. And I can't wholly rely on the arguments of  
 03:34:03 **25** counsel on that point.

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03:34:05 **1** I'm not saying that a better record on this  
 03:34:07 **2** issue in and of itself would make the difference in  
 03:34:10 **3** Defendant's favor in a case dispositive stage of the case.  
 03:34:13 **4** All I'm saying is that if it were, that stage would be the  
 03:34:16 **5** right stage to fully assess the record on that issue, not  
 03:34:18 **6** the pleadings stage.  
 03:34:20 **7** In addition to *SR*, the representative claims  
 03:34:24 **8** here also don't seem all that different to the Court than  
 03:34:27 **9** the claims at issue in *Thales Visionix Inc. vs. United*  
 03:34:32 **10** *States*, another Federal Circuit case. Claim 22 in *Thales*  
 03:34:35 **11** was exemplary and it was briefed. In two lines, it recited  
 03:34:38 **12** a method of determining an object's orientation based on the  
 03:34:42 **13** outputs of two inertial sensors that were mounted  
 03:34:45 **14** respectively on the objects and moving reference point.  
 03:34:49 **15** The specification explained how conventional  
 03:34:51 **16** methods retracting an object's motion were flawed, and that  
 03:34:56 **17** the patent's invention provided multiple advantages,  
 03:34:59 **18** including increased accuracy, the ability to operate without  
 03:35:02 **19** requiring hardware and simple installation.  
 03:35:04 **20** And in finding of step one, the claim and  
 03:35:06 **21** another representative claim were not directed to the  
 03:35:08 **22** abstract idea of using laws of nature governing motion to  
 03:35:13 **23** track two objects. The Federal Circuit noted that, instead,  
 03:35:16 **24** the "claims specify a particular configuration of inertial  
 03:35:20 **25** sensors and a particular method of using the raw data from

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03:35:23 **1** the sensors in order to more accurately calculate the  
 03:35:26 **2** position and orientation of an object on a moving platform."  
 03:35:31 **3** Now, the Federal Circuit said this even though  
 03:35:33 **4** like here, Claim 22 did not specify how to determine the  
 03:35:37 **5** orientation of the object or what process or formulas were  
 03:35:40 **6** used to do that. The claim just said that the use of "based  
 03:35:44 **7** on" signals from their respective two sensors. Nor do the  
 03:35:48 **8** claims say how those sensors work to provide signals.  
 03:35:52 **9** And the sensors used in *Thales*, like the probes  
 03:35:54 **10** and sensors used here, were conventional in the art.  
 03:35:58 **11** Nevertheless, it was enough for the Federal Circuit that the  
 03:36:00 **12** configurations of the sensors was a "particular" one. It  
 03:36:03 **13** was used in a "particular method" for collecting data.  
 03:36:08 **14** In other words, sufficient particularity was  
 03:36:10 **15** demonstrated by the fact that the sensors were specified to  
 03:36:12 **16** be placed in two different positions, an object and a moving  
 03:36:16 **17** reference frame, so long as the patent or the record helped  
 03:36:19 **18** make clear how that particular arrangement solved the  
 03:36:22 **19** technological problem. Similarly, here, it's at least  
 03:36:25 **20** plausible that the claims at issue contain a similar level  
 03:36:27 **21** of particularity, and that a probe is used to do positive  
 03:36:31 **22** and negative filtering, and then is used a second time to  
 03:36:34 **23** assess residual status in it. And then in certain claims  
 03:36:37 **24** data from multiple purposes is utilized.  
 03:36:39 **25** As noted above, the record contains indication

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03:36:42 **1** in support of combination of steps taken together with the  
 03:36:44 **2** rest of the elements of the claims at issue, amounted to  
 03:36:47 **3** unconventional ways to use computerized probes in order to  
 03:36:50 **4** solve a problem in computer securities.  
 03:36:52 **5** Lastly, the Court knows that the Supreme Court  
 03:36:56 **6** has stated the eligibility analysis is driven by the concern  
 03:36:59 **7** of preemption. The preemption analysis in turn compels a  
 03:37:03 **8** Court to assess whether the claims at issue attempt to  
 03:37:06 **9** preempt every application or at least a great many  
 03:37:10 **10** applications of the abstract at issue.  
 03:37:13 **11** And, here, in the Court's view, the record  
 03:37:15 **12** provides at least some indication that the claims don't  
 03:37:17 **13** preempt all of this and perhaps don't even preempt very many  
 03:37:21 **14** of these of "collecting, filtering, analyzing and  
 03:37:24 **15** transmitting data and then making modifications based on  
 03:37:27 **16** human feedback."  
 03:37:28 **17** Paragraph 38 in the Complaint tells us that one  
 03:37:31 **18** could simply collect and analyze status data by simply using  
 03:37:34 **19** a positive and negative filter without, also, as the claims  
 03:37:37 **20** do, then using the probe again to reassess residual data  
 03:37:40 **21** that didn't fall into the positive or negative categories of  
 03:37:44 **22** the first filtering stage.  
 03:37:45 **23** And it also tells us that one could collect,  
 03:37:47 **24** filter and analyze data only by using one probe instead of,  
 03:37:50 **25** as in certain dependent claims here, by obtaining and

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03:37:54 **1** correlating information from multiple probes. The extent to  
 03:37:57 **2** which the claims do not preempt the field of the abstract  
 03:38:00 **3** idea is a fact question, not inevitable to resolution at the  
 03:38:03 **4** Rule 12 stage, at least based on this record.  
 03:38:06 **5** So, for all these reasons, the Court denies  
 03:38:10 **6** Defendant's motion at step two of the *Alice* analysis without  
 03:38:13 **7** prejudice to Defendant's ability to re-raise the issue at  
 03:38:16 **8** the case dispositive motion stage.  
 03:38:18 **9** Okay. I'll now move on to the second and third  
 03:38:27 **10** cases which are related. Attentive Mobile, Inc. is the  
 03:38:30 **11** Plaintiff in both cases. And in Civil Action 22-1163-CJB,  
 03:38:34 **12** the Defendant is 317 Labs, Inc., doing business as Emotive.  
 03:38:38 **13** I'll refer to the Defendant there as Emotive and to the case  
 03:38:42 **14** as the Emotive case.  
 03:38:43 **15** And in Civil Action Number 23-87-CJB, the  
 03:38:47 **16** Defendant is Stodge, Inc. doing business as Postscript.  
 03:38:50 **17** I'll refer to that Defendant as Postscript and to the case  
 03:38:53 **18** as the Postscript case.  
 03:38:55 **19** In these cases, we have Defendants' Rule  
 03:38:56 **20** 12(b)(6) motions. Most of, though not all of the motions in  
 03:38:59 **21** the Emotive case and the entirety of the motion in the  
 03:39:02 **22** Postscript case is premised on the ground that the operative  
 03:39:05 **23** Complaint should be dismissed on a Section 101 eligibility  
 03:39:08 **24** basis. The Court will address only those Section 101  
 03:39:11 **25** grounds for dismissal now and will deny the motions as they

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03:39:14 **1** relate to Section 101 for the reasons I'll set out herein.  
 03:39:18 **2** Plaintiff asserts in its Complaint in the  
 03:39:22 **3** Emotive case that Defendant infringes at least independent  
 03:39:24 **4** Claim 1 of the United States Patent Number 11,416,887, which  
 03:39:28 **5** I'll refer to as the '887 patent, and independent Claim 15  
 03:39:32 **6** of United States Patent Number 11,416,897, which I'll refer  
 03:39:36 **7** to as the '897 patent.  
 03:39:38 **8** In the Postscript case, Plaintiff asserts that  
 03:39:41 **9** Defendant infringes at least those two claims, as well as  
 03:39:44 **10** independent Claim 23 of the United States Patent Number  
 03:39:47 **11** 11,553,074 or the '074 patent. The three asserted patents  
 03:39:52 **12** share the same title, same inventors and nearly identical  
 03:39:55 **13** specification.  
 03:39:56 **14** In their briefing, both Defendants agree that  
 03:39:58 **15** the respective asserted independent claims call out or  
 03:40:01 **16** respective Complaints are representative of each other and  
 03:40:04 **17** of all asserted claims for Section 101 purposes. And so,  
 03:40:07 **18** they treated those claims interchangeably throughout their  
 03:40:10 **19** arguments in the briefs.  
 03:40:12 **20** For its part, Plaintiff took issue in its  
 03:40:13 **21** briefing with the idea that these three claims might be  
 03:40:16 **22** representative of all the claims in the patents for  
 03:40:19 **23** Section 101 purposes. But aside from the brief mention that  
 03:40:23 **24** the content of a few dependent claims of the '887 patent in  
 03:40:26 **25** its answering brief in the Postscript case, Plaintiff didn't

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03:40:28 **1** really make a meaningful argument as to the distinctiveness  
 03:40:31 **2** of the dependent claims.  
 03:40:34 **3** In any event, for ease of reference, the Court  
 03:40:36 **4** will focus on Claim 1 of the '887 patent in rendering its  
 03:40:40 **5** decision today. The Court need not trouble itself further  
 03:40:43 **6** with the question of whether this claim is representative of  
 03:40:45 **7** all the asserted claims in the case. That's because since  
 03:40:49 **8** the Defendant's motion rose and fell with its arguments  
 03:40:50 **9** about three listed independent claims, and since the Court  
 03:40:54 **10** is concluding here that Claim 1 and those other two listed  
 03:40:57 **11** claims are not claims to an abstract idea, the Court is  
 03:41:00 **12** necessarily finding that the motions should be dismissed as  
 03:41:03 **13** to all asserted claims of the patents.  
 03:41:05 **14** One other procedural note before I begin with  
 03:41:08 **15** the *Alice* two-step analysis. In the briefing at least,  
 03:41:11 **16** certain parties, particularly Emotive, appeared to cite to  
 03:41:14 **17** at least some materials that may not have been referenced in  
 03:41:16 **18** the Complaint in the case, or attached to the Complaint or  
 03:41:20 **19** integral to the Complaint. To the extent they did so, the  
 03:41:24 **20** Court knows that I cannot take such material into account in  
 03:41:26 **21** resolving the motion to dismiss, and so I will not do so  
 03:41:29 **22** here.  
 03:41:29 **23** I'll now turn to the *Alice* analysis at step one.  
 03:41:32 **24** At this step, the two Defendants have similar, though  
 03:41:35 **25** slightly different articulations of the abstract idea that



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03:41:38 **1** Claim 1 is purportedly directed to. Emotive framed its  
 03:41:42 **2** abstract idea a few different ways in the briefing, but the  
 03:41:45 **3** articulation that's probably most faithful to its briefing  
 03:41:48 **4** is "providing a streamline process to sign up for marketing  
 03:41:52 **5** promotions or services."  
 03:41:54 **6** Postscript, for its part, asserts that the  
 03:41:56 **7** abstract idea at issue is "streamlining the process for a  
 03:42:00 **8** customer to enroll in a marketing promotion by providing a  
 03:42:03 **9** pre-filled and pre-addressed request."  
 03:42:05 **10** In other words, Postscript's asserted abstract  
 03:42:08 **11** idea is a bit narrower than Emotive's is in that Postscript  
 03:42:12 **12** is allowing the method of streamlining issue must be  
 03:42:14 **13** accomplished via the use of a pre-filled and pre-addressed  
 03:42:17 **14** request. But overall the two asserted abstract ideas at  
 03:42:20 **15** issue are fairly similar.  
 03:42:22 **16** For ease of reference today, the Court will  
 03:42:23 **17** utilize Postscript's abstract idea when discussing these  
 03:42:27 **18** issues and will assume, for the sake of argument, that both  
 03:42:30 **19** Defendants were pointing to that articulation as the concept  
 03:42:32 **20** that the claims are directed to.  
 03:42:34 **21** I note that in doing so, I'm essentially doing  
 03:42:36 **22** Emotive a favor, because the proposed abstract idea is even  
 03:42:39 **23** broader than Postscript's. And so, it would suffer from  
 03:42:42 **24** even worse step one problems of the type I'm about to  
 03:42:45 **25** describe when analyzing the abstract idea that Postscript

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03:42:48 **1** says it is directed to.  
 03:42:50 **2** So, the next question is: Is streamlining a  
 03:42:52 **3** process for a customer to enroll in a marketing promotion by  
 03:42:56 **4** providing a pre-filled and pre-addressed request an abstract  
 03:43:00 **5** idea? Here, there's no dispute that it is. And in its  
 03:43:03 **6** briefing, Plaintiff essentially acknowledges that this "bare  
 03:43:07 **7** idea may be abstract," but goes on to argue that Claim 1 is  
 03:43:11 **8** not, in fact, directed to that.  
 03:43:13 **9** Instead, Plaintiff argues that the claim is  
 03:43:15 **10** directed to a specific "improved mobile sign-up system that  
 03:43:20 **11** merely involves this idea." With that understood, the Court  
 03:43:23 **12** next must assess whether Claim 1 is actually directed to the  
 03:43:27 **13** abstract idea at issue. To do that, we need to understand  
 03:43:30 **14** the claim and what it covers.  
 03:43:33 **15** Claim 1 is a claim to a "non-transitory process  
 03:43:37 **16** or readable mean storing code" that causes a "click-to-text  
 03:43:42 **17** server" to do the following. First, send to a client server  
 03:43:46 **18** an integration tag that is "configured to be served with a  
 03:43:50 **19** web page" posted by that client server.  
 03:43:54 **20** The integration tag causes any mobile device  
 03:43:56 **21** that hosts that web page via first application to send user  
 03:43:59 **22** data to either the client server or the click-to-text  
 03:44:03 **23** server.  
 03:44:03 **24** Second, once the mobile device executes the  
 03:44:05 **25** integration, the click detect server sends "a uniform

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03:44:09 **1** resource identifier or URI, which is the type of link to the  
 03:44:14 **2** mobile device." This URI is described as "deeplink to a  
 03:44:18 **3** messaging application different from the first application."  
 03:44:22 **4** The claim goes on to explain that once the  
 03:44:24 **5** mobile device detects the user interacting with a  
 03:44:28 **6** "promotional message associated with the web page" that the  
 03:44:31 **7** URI causes the mobile device to "automatically transition  
 03:44:35 **8** from the first application to the messaging application" and  
 03:44:39 **9** "automatically populate a custom message in the messaging  
 03:44:43 **10** application that includes an address associated with the  
 03:44:45 **11** click detect server and a message product that includes an  
 03:44:48 **12** identifier associated with at least one of the web page or  
 03:44:52 **13** the user data."  
 03:44:53 **14** The claim goes on to explain that once the  
 03:44:57 **15** mobile device detects that the user has hit the send button  
 03:44:59 **16** of the messaging, then the mobile device "sends the custom  
 03:45:02 **17** message to the click-to-text server."  
 03:45:05 **18** Third, the click detect server receives the  
 03:45:09 **19** custom message.  
 03:45:10 **20** Fourth, the server then enrolls the mobile  
 03:45:11 **21** device in a promotion associated with the promotional  
 03:45:14 **22** message that the user accessed on the web page.  
 03:45:17 **23** An embodiment of how this process works is seen  
 03:45:21 **24** in Figures 2A to C of the patents. Those figures depict a  
 03:45:25 **25** user's mobile phone wherein the user is looking at a web

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03:45:28 **1** page and clicking on a promotional link on the web page.  
 03:45:31 **2** Once the user does so, the mobile device automatically  
 03:45:34 **3** transitions from the web page to a messaging app.  
 03:45:37 **4** In the messaging app, the text message computer  
 03:45:39 **5** that's been automatically populated with text asking the  
 03:45:42 **6** companies to subscribe the user to the product service and  
 03:45:45 **7** with the advertising company's phone number listed as the  
 03:45:47 **8** location where the message will be sent.  
 03:45:49 **9** And the figures demonstrate how by hitting the  
 03:45:53 **10** send button on the messaging app, the user can send a  
 03:45:55 **11** message. It is then enrolled in or subscribed to the  
 03:45:57 **12** service.  
 03:46:01 **13** Understanding what's claimed in Claim 1, we now  
 03:46:04 **14** have to determine what that claim is directed to. As I've  
 03:46:06 **15** explained earlier, the Federal Circuit requires that the  
 03:46:09 **16** Court examine the patents, particularly the patent  
 03:46:11 **17** specification, to assess what is the focus of the claim or  
 03:46:16 **18** what is its character as a whole. Is the claim's focus or  
 03:46:21 **19** character as a whole simply about the general concept of  
 03:46:25 **20** "streamlining the process for a customer to enroll in a  
 03:46:28 **21** marketing promotion by providing a pre-filled and  
 03:46:31 **22** pre-addressed request" or is it about something more than  
 03:46:34 **23** that or different than that?  
 03:46:37 **24** In engaging in the step one inquiry, here the  
 03:46:39 **25** Court is particularly mindful of the guidance from the

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03:46:41 **1** Federal Circuit. In cases like *McRO, Inc. vs. Bandai Namco*  
 03:46:46 **2** *Games America*. In *McRO*, the Federal Circuit instructed  
 03:46:49 **3** Courts to be careful to avoid oversimplifying claims by  
 03:46:53 **4** looking at them generally and failing to account for the  
 03:46:56 **5** specific requirements found therein.  
 03:46:58 **6** In the Court's view, that is what Defendants  
 03:47:01 **7** have done by way of their assertions that the claims are  
 03:47:03 **8** only directed to the abstract idea at issue. The Court  
 03:47:08 **9** comes to this conclusion because the patent specification  
 03:47:10 **10** tells us time and time again in many different ways that how  
 03:47:15 **11** everyone might articulate what Claim 1 is directed to, that  
 03:47:18 **12** concept needs to take into account the fact that the claim  
 03:47:22 **13** makes use of what the patent refers to as a custom-generated  
 03:47:26 **14** deeplinking process.  
 03:47:28 **15** More specifically, what's key to the patent is  
 03:47:31 **16** that in response to a user clicking on a website's  
 03:47:33 **17** promotional advertising and using a first application, a URI  
 03:47:37 **18** generated by the claim's click-to-text server then deep  
 03:47:41 **19** links to a second messaging application in which a custom  
 03:47:44 **20** enrollment message with data related to that user or the  
 03:47:47 **21** website that the user visited is automatically populated to  
 03:47:51 **22** the messaging. And this concept is central to the focus of  
 03:47:55 **23** Claim 1 is evident from many parts of the patents. Of  
 03:47:59 **24** course, the concept is found in text in Claim 1 itself, but  
 03:48:03 **25** it's also highlighted consistently in various other parts of

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03:48:06 **1** the patent as well.  
 03:48:07 **2** To start, just look at the patent's title. That  
 03:48:10 **3** title is "Methods and Apparatuses for Mobile Device  
 03:48:10 **4** Messaging-Based Communications Using Custom-Generated  
 03:48:18 **5** Deeplinks and Based on the Hypertext Transfer Protocol,  
 03:48:21 **6** HTTP."  
 03:48:23 **7** The title makes clear that the patent's claims  
 03:48:25 **8** are not simply broadly about the concept of streamlining a  
 03:48:29 **9** customer's enrollment process by providing a pre-filled and  
 03:48:32 **10** pre-addressed request in any old way one wishes to.  
 03:48:36 **11** Instead, they're about doing so in a more particular way,  
 03:48:39 **12** one that must make use of what the patent refers to in  
 03:48:42 **13** shorthand as custom-generated deep links.  
 03:48:45 **14** Before going further, let's understand what is  
 03:48:48 **15** deeplink or a deeplink associated with a URI. In Column 3,  
 03:48:52 **16** the specification describes deeplinking as a type of link  
 03:48:55 **17** used in mobile applications that allows the linking of one  
 03:48:59 **18** mobile application to another mobile application. And it  
 03:49:02 **19** explains that deeplinking can use a URI that links to a  
 03:49:05 **20** mobile application or to a specific location within a mobile  
 03:49:08 **21** application.  
 03:49:09 **22** So, in other words, using a URI will accomplish  
 03:49:12 **23** deeplinking is a method of using computer technology to  
 03:49:14 **24** automatically transition from one mobile to another. I  
 03:49:17 **25** should also note that Defendants assert and Plaintiff does

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03:49:21 **1** not dispute that the concept that deeplinking was known in  
 03:49:23 **2** the art at the time of the patents. Indeed, this seems to  
 03:49:27 **3** be indicated in Column 3 of the patent.  
 03:49:28 **4** Where else does the patent indicate that the  
 03:49:32 **5** concept of custom-generated deeplinking is central to what  
 03:49:35 **6** Claim 1 is about? Well, the abstract tells us this. It  
 03:49:39 **7** prominently notes that the claims involve a response to user  
 03:49:42 **8** input sending an HTTP response message, including the "URI of  
 03:49:46 **9** the second user interface and the purchase information to  
 03:49:50 **10** deeplink to the second user interface, and to cause the  
 03:49:53 **11** second user interface to be rendered at the mobile device  
 03:49:55 **12** with the purchase information pre-populated in an input  
 03:49:59 **13** field in the text messaging. This description makes up half  
 03:50:03 **14** of the abstract's text.  
 03:50:05 **15** The summary section of the patent also indicates  
 03:50:07 **16** the prominence of what's called a custom-generated deeplink.  
 03:50:11 **17** A good portion of its text, which runs for about 40 lines,  
 03:50:15 **18** are just about the same process of sending a URI purchase  
 03:50:18 **19** information to deeplink to the second user interface and to  
 03:50:21 **20** cause a pre-populated text message, including user data or  
 03:50:25 **21** website data to be generated.  
 03:50:27 **22** And if there was any doubt remaining about  
 03:50:29 **23** whether Claim 1 was directed to a concept that has to  
 03:50:32 **24** include some reference to custom-generated deeplink, it  
 03:50:34 **25** comes in the background section of the patent at Column 1.

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03:50:37 **1** There, the patentees are explaining what is the problem that  
 03:50:40 **2** the invention hopes to solve and how it intends to do so.  
 03:50:43 **3** The patent notes that known computer methods  
 03:50:46 **4** allow a mobile device user to be able to open a vendor's app  
 03:50:50 **5** or vendor's website in order to select a product for  
 03:50:53 **6** service, a field in which the user could provide payment  
 03:50:56 **7** information in order to complete a transaction. But the  
 03:50:58 **8** patents explain that with these known methods, the user  
 03:51:01 **9** often had to pause the server's previous activities such as  
 03:51:03 **10** viewing a website or reading an email on the mobile device  
 03:51:06 **11** because the computer automatically redirected them to the  
 03:51:09 **12** vendor's app or website. When the user got there, signing  
 03:51:13 **13** up for the product or services often required lots of user  
 03:51:16 **14** input, such as many different clicks of screen taps in order  
 03:51:19 **15** to complete the transaction.  
 03:51:21 **16** The patent explains that this "time consuming  
 03:51:23 **17** and burdensome process results in many users leaving the  
 03:51:26 **18** purchase before the transaction is completed." And  
 03:51:29 **19** Plaintiff's complaints also add that sometimes users would  
 03:51:32 **20** fail to complete these purchases, not just due to lost  
 03:51:35 **21** interest, but also due to too many mistyped numbers.  
 03:51:39 **22** Accordingly, in the Background Section of the  
 03:51:41 **23** patents, the patent even concludes by stating that, "A need  
 03:51:43 **24** exists for methods and apparatus for dynamic application  
 03:51:47 **25** deeplink to transition from one user interface to another

03:51:50 **1** user interface at a mobile device for continuing and  
 03:51:53 **2** improved user experience and engagement when interacting  
 03:51:56 **3** with the mobile device."

03:51:57 **4** So, sure, the claims certainly involve the  
 03:52:00 **5** concept of "streamlining a process for a customer to enroll  
 03:52:04 **6** in a marketing promotion by providing pre-filled and  
 03:52:08 **7** pre-addressed requests." But as the Federal Circuit  
 03:52:10 **8** explained in *Enfish LLC vs. Microsoft Corp.*, the step one  
 03:52:14 **9** inquiry "cannot simply ask whether the claims involve a  
 03:52:18 **10** patent eligible concept because essentially every routinely  
 03:52:21 **11** patent eligible claim" does so at some level.

03:52:24 **12** For that reason, in *Enfish* the Federal Circuit  
 03:52:28 **13** cautioned District Courts not to "describe the claims at  
 03:52:31 **14** such a high level of extraction" so that the description is  
 03:52:35 **15** "untethered from the language of the claims" in a way that  
 03:52:39 **16** "all but ensures the exceptions to Section 101 follow the  
 03:52:42 **17** rule."

03:52:43 **18** In the Court's view, that's what Defendants have  
 03:52:46 **19** done here. They've identified an abstract concept that  
 03:52:49 **20** Claim 1 involves, not the concept that Claim 1 is directed  
 03:52:52 **21** to.

03:52:53 **22** Another way to understand that this is what's  
 03:52:55 **23** going on here is by realizing that there truly are many  
 03:52:59 **24** possible ways of streamlining the process for customer  
 03:53:02 **25** enrollment in a marketing promotion by providing the

03:53:04 **1** customer with a pre-filled and pre-addressed request, that  
 03:53:07 **2** the patents are surely not directed to or about all of them.

03:53:11 **3** For example, Defendants discuss some of those  
 03:53:13 **4** possible ways in their briefing. One of which doesn't even  
 03:53:15 **5** require the use of computer technology. On this, the  
 03:53:19 **6** Defendants note that for years magazines would include  
 03:53:21 **7** pre-populated forms with a mailing address, pre-typed  
 03:53:24 **8** message stating that the sender wishes to subscribe to a  
 03:53:28 **9** magazine and prepaid postage. All the customer would have  
 03:53:30 **10** to do to subscribe is to send that pre-filled, pre-addressed  
 03:53:33 **11** request.

03:53:33 **12** And one can surely posit many other ways, even  
 03:53:37 **13** many other computerized ways of streamlining a customer's  
 03:53:40 **14** enrollment process by providing the customer with a  
 03:53:42 **15** pre-filled and pre-addressed request that don't involve the  
 03:53:45 **16** claim solution. Perhaps, a company, for example, could send  
 03:53:49 **17** an email to a customer that includes a pre-filled,  
 03:53:52 **18** pre-addressed enrollment form attached such that all the  
 03:53:55 **19** customer needs to do is print out the attachment and send  
 03:53:58 **20** the form away in U.S. mail to the company, or a company  
 03:54:01 **21** could enable a user to download an app, and it could click  
 03:54:04 **22** on a promotional request, which would generate a pop-up  
 03:54:07 **23** screen that the user saw that was pre-populated with the  
 03:54:09 **24** user's information. Or the user might click a promotional  
 03:54:12 **25** link on a web page that takes the user to a request, and

03:54:15 **1** then a screen pops up that asks if the user would like their  
 03:54:18 **2** personal information auto-filled into the request.

03:54:22 **3** In asserting that all Claim 1 is directed to is  
 03:54:24 **4** streamlining the process for a customer to enroll in a  
 03:54:27 **5** marketing promotion by providing a pre-filled and  
 03:54:30 **6** pre-addressed request, Defendants are essentially suggesting  
 03:54:33 **7** that the patent's really directed to a general concept that  
 03:54:36 **8** would cover any and all of these solutions or others.

03:54:40 **9** And, obviously, for the reasons the Court has  
 03:54:42 **10** set out previously, that's just not so. The particular way  
 03:54:46 **11** that Claim 1 goes about providing a pre-filled and  
 03:54:49 **12** pre-addressed request, that is by utilizing a process that  
 03:54:52 **13** obtains user data via integration tags embedded in websites  
 03:54:56 **14** and employing a URI that deep links from one mobile app to  
 03:55:00 **15** another message app, and where the message app's  
 03:55:02 **16** automatically populated by a text message that contains user  
 03:55:05 **17** information or web page information.

03:55:08 **18** That's not an afterthought in the claim.  
 03:55:10 **19** Instead, it's the start of the claim.

03:55:13 **20** Now, it is understandable why the Defendant in  
 03:55:17 **21** these issues might not want to include the concept of  
 03:55:19 **22** custom-generated deeplinking in its assertion about what  
 03:55:22 **23** Claim 1 is directed to, even though it seems like every part  
 03:55:25 **24** of the patent is telling us that that concept surely is a  
 03:55:27 **25** part of the patent's focus. After all, the more that the

03:55:30 **1** purported abstract idea sounds like it includes reference to  
 03:55:33 **2** a particular type of computer technology that generates a  
 03:55:37 **3** particular type of custom tech message, the more that  
 03:55:40 **4** concept starts to sound like it's not an abstract idea at  
 03:55:43 **5** all. And, certainly, not a longstanding commercial practice  
 03:55:46 **6** that people have been engaging in for generations. Instead,  
 03:55:49 **7** the concept will start to sound a lot more like a particular  
 03:55:52 **8** real-world application of an abstract idea.

03:55:55 **9** The Court also notes that in their supplemental  
 03:55:58 **10** briefing, both Defendants cited *Customedia Technologies LLC*  
 03:56:02 **11** *vs. Dish Network Corp.* as the most analogous Federal Circuit  
 03:56:04 **12** case on point. Now, neither Defendant actually cited the  
 03:56:09 **13** *Customedia* in their opening briefs, which is surprising  
 03:56:11 **14** considering Defendants now count the case as the most  
 03:56:15 **15** impactful case in support of their arguments.

03:56:17 **16** As a result of this, unfortunately, the  
 03:56:18 **17** Plaintiff never got a chance to brief its thoughts about why  
 03:56:20 **18** that case was on point. That said, though, the Court will  
 03:56:23 **19** address *Customedia* here.

03:56:25 **20** The representative claim in *Customedia* was to a  
 03:56:28 **21** data delivery system for providing automatically delivery  
 03:56:31 **22** of multimedia products. The claim did so by using a "remote  
 03:56:35 **23** and counter transaction server for providing multimedia data  
 03:56:38 **24** products on a user" where at least one of those products was  
 03:56:41 **25** "specifically identified advertising data."

03:56:45 **1** Additionally, the claim employed a "programmable  
 03:56:49 **2** local receiver unit" that received the data products. That  
 03:56:53 **3** unit had at least one "individually controlled and reserved  
 03:56:57 **4** advertising data storage section adapted specifically for  
 03:57:01 **5** storing the specific data by undersizing data" that was  
 03:57:05 **6** "monitored and controlled by the remote transaction server."  
 03:57:09 **7** In step one, the Federal Circuit found that the  
 03:57:12 **8** claim was simply directed to "using a computer to deliver  
 03:57:16 **9** targeted advertising to a user" which was an abstract idea.  
 03:57:20 **10** Now, the patentee had argued, otherwise, that the claim was  
 03:57:23 **11** instead directed to an improvement in the data delivery  
 03:57:26 **12** system's ability to store advertising by dedicating a  
 03:57:29 **13** section of the computer's memory to such data.  
 03:57:31 **14** But the *Customedia* Court disagreed noting that  
 03:57:35 **15** "The claimed invention nearly improves the abstract concept  
 03:57:38 **16** of delivering targeted advertising using a computer only as  
 03:57:41 **17** a tool." It came to this conclusion because the claim did  
 03:57:44 **18** not "enable computers to operate more quickly or  
 03:57:48 **19** efficiently, nor do they solve any technological problem."  
 03:57:52 **20** In support of that key conclusion, the Court  
 03:57:54 **21** noted that the "specification is silent as to any specific  
 03:57:58 **22** structural or inventive improvements in computer  
 03:58:01 **23** functionality related to this claim system." Instead, the  
 03:58:05 **24** Court said that the "only improvements identified in the  
 03:58:07 **25** specification are generic speed and efficiency improvements

03:58:11 **1** and hurt in applying the use of a computer to end tasks."  
 03:58:16 **2** In the Court's view, however, Claim 1 in the patents-in-suit  
 03:58:19 **3** here are not on all fours with the representative claim in  
 03:58:22 **4** the patents at issue in *Customedia*.  
 03:58:25 **5** The Court has reviewed the representative '090  
 03:58:28 **6** patent that was at issue in *Customedia*. That patent's title  
 03:58:31 **7** was generic. It was "System For Data Management and On  
 03:58:36 **8** Demand Rental In The Purchase of Digital Data Products."  
 03:58:38 **9** Its abstract and other key portions of the patent did not  
 03:58:42 **10** seem to tout the unconventional nature of the claim's  
 03:58:45 **11** assertedly approved way to store advertising data. Indeed,  
 03:58:48 **12** it appears the patent specification said little about why  
 03:58:51 **13** the assertedly important claimed step of reserving memory to  
 03:58:56 **14** ensure sufficient storage space for advertising data was  
 03:58:59 **15** significant or why it amounted to an improvement in computer  
 03:59:02 **16** functionality.  
 03:59:03 **17** In contrast here, as the Court has explained,  
 03:59:05 **18** the patent specification focuses resolutely and repeatedly  
 03:59:08 **19** on the importance of using what it calls custom-generated  
 03:59:12 **20** deeplinking to improve the way that mobile electronic  
 03:59:14 **21** devices are able to enroll customers in promotions. And in  
 03:59:17 **22** Column 1, the patents do appear to indicate that this  
 03:59:20 **23** particular claimed arrangement, that is, the use of  
 03:59:22 **24** integration tags embedded in web pages such that the tag  
 03:59:26 **25** returns user data to a server if a web page is accessed, and

03:59:29 **1** then utilization of URIs that deeplink to a pre-filled text  
 03:59:33 **2** message that includes user data or website data, so long as  
 03:59:36 **3** the user clicks on an advertisement on the web page, all  
 03:59:40 **4** amounts to improvement in the way a computer technology  
 03:59:43 **5** worked in the space.  
 03:59:44 **6** Column 1 indicates that prior to the invention,  
 03:59:47 **7** computerized mobile devices functioned in a different way to  
 03:59:50 **8** attempt to get customers to select the product service.  
 03:59:53 **9** That is, they agreed to direct the user to a vendor's  
 03:59:57 **10** application or a vendor's website in order to have them  
 03:59:59 **11** provide payment information through the use of many clicks.  
 04:00:02 **12** Now, after the invention, according to Column 1,  
 04:00:04 **13** the device is functioning in a new and improved and  
 04:00:07 **14** different way, one that utilized the claimed  
 04:00:11 **15** custom-generated deeplinking process to allow users to sign  
 04:00:13 **16** up for promotions while minimizing user input.  
 04:00:16 **17** Therefore, because Claim 1 is not directed to  
 04:00:17 **18** the abstract idea put forward by Defendants, the motions are  
 04:00:22 **19** denied at step one on that basis. Although the Court could  
 04:00:25 **20** stop there, for the sake of completion, it notes that even  
 04:00:29 **21** if it was somehow wrong about this step one conclusion, and  
 04:00:32 **22** even if Claim 1 could be said to have been directed to the  
 04:00:36 **23** abstract idea of streamlining the process for a customer to  
 04:00:39 **24** enroll in a marketing promotion by providing a pre-filled  
 04:00:42 **25** and pre-addressed request, the motions would still have been

04:00:45 **1** denied in step two. That's because, for the reasons the  
 04:00:48 **2** Court has expressed, that abstract idea wouldn't fairly take  
 04:00:52 **3** into account other narrowing aspects of the claim, including  
 04:00:55 **4** at least, first, the claim's use of integration tags  
 04:00:58 **5** associated with a web page to collect user data when a user  
 04:01:02 **6** loads the web page via first application.  
 04:01:04 **7** Second, the claim's click-to-text server  
 04:01:07 **8** creating and sending a URI to the mobile device in response  
 04:01:10 **9** to the device's execution of the integration tag.  
 04:01:12 **10** And, third, the fact that the URI deep links to  
 04:01:15 **11** a messaging application such that when the user interacts  
 04:01:18 **12** with a promotional message on a website, the URI causes the  
 04:01:22 **13** mobile device to transition from the website app to the  
 04:01:24 **14** messaging app.  
 04:01:25 **15** The Court understands Defendants' arguments,  
 04:01:27 **16** that each of these individual computer concepts, standing  
 04:01:30 **17** alone, were well known in the computer arms at the time.  
 04:01:33 **18** For example, the Court's already explained how the patent  
 04:01:36 **19** suggests that the use of URIs with deep links were known,  
 04:01:39 **20** nor that the patentees claim to have invented the  
 04:01:41 **21** integration tags.  
 04:01:42 **22** The Plaintiff does not argue that the concept of  
 04:01:44 **23** pre-populated text messages in and of itself was not in use  
 04:01:48 **24** then and websites were surely well known at the time. But,  
 04:01:50 **25** of course, as the Federal Circuit told us in *BASCOM*, the

04:01:53 **1** inventive concept inquiry requires more than recognizing  
 04:01:56 **2** that each claim element by itself was known in the art.  
 04:01:59 **3** Instead, it allows that an inventive concept can be found in  
 04:02:02 **4** a non-conventional and non-generic arrangement of known  
 04:02:06 **5** conventional pieces.  
 04:02:08 **6** In the Court's view, the Defendants seem to  
 04:02:09 **7** ignore this instruction from *BASCOM*. Instead, they  
 04:02:13 **8** continually note that each additional claim element such as  
 04:02:16 **9** the use of servers, or use of web pages, or the use of an  
 04:02:19 **10** integration tag, or the use of URI from deep links to  
 04:02:22 **11** transition between applications were each, standing alone,  
 04:02:26 **12** well known at the time.  
 04:02:27 **13** But *BASCOM*'s point is that even claims that use  
 04:02:30 **14** many individual technological components that themselves  
 04:02:33 **15** were conventional can still be patent eligible if the  
 04:02:37 **16** particular ordered combination of those known elements are  
 04:02:40 **17** used in an unconventional way.  
 04:02:42 **18** In their briefing, Defendants also boldly  
 04:02:45 **19** asserted the particular ordered combination of technology  
 04:02:48 **20** set out in Claim 1. In fact, amounted to the "ordinary use"  
 04:02:53 **21** of computers at the time or the "ordinary and expected way"  
 04:02:58 **22** computers were being used then.  
 04:03:00 **23** But Defendants certainly do not point to any  
 04:03:02 **24** part of the record that demonstrates that this was so as to  
 04:03:05 **25** the entirety of the ordered combination, and they do not

04:03:08 **1** cite to any source for such a conclusion. Instead, they  
 04:03:12 **2** simply fall back on the notion that web pages alone were  
 04:03:15 **3** "ordinary", or that integration tags alone were ordered or  
 04:03:19 **4** the deep links alone were ordered. But that kind of  
 04:03:23 **5** argument is not enough because it doesn't address the  
 04:03:25 **6** ordered combination of all those known technological steps  
 04:03:28 **7** that are set out in the claim.  
 04:03:31 **8** Indeed, during oral argument today when I asked  
 04:03:33 **9** at least Emotive's counsel as to whether certain  
 04:03:35 **10** combinations or portions of the claimed solution amounted to  
 04:03:38 **11** the unconventional use of computer technology at the time of  
 04:03:40 **12** the patent, counsel at times noted that there may be  
 04:03:44 **13** uncertainty on those points in the record stating that it  
 04:03:47 **14** may be "a little bit of a leap" to draw such conclusions  
 04:03:50 **15** from the record or that conventionality "has to be true."  
 04:03:55 **16** Here, though, Defendants are asking the Court to  
 04:03:58 **17** grant a motion to dismiss based on the uncontroverted  
 04:04:01 **18** presence of a winning affirmative defense. And so, the  
 04:04:04 **19** record is unclear as to the key points. Or if the Court is  
 04:04:07 **20** asked to assume that something has to be true, then the  
 04:04:10 **21** motion should not be granted.  
 04:04:12 **22** Moreover, there are some portions of the record  
 04:04:14 **23** that do suggest that the ordered combination of steps in  
 04:04:17 **24** Claim 1 did not amount to the conventional use of computer  
 04:04:21 **25** technology. For one thing, as I've noted, the patent

04:04:23 **1** provides some suggestion of this in Column 1's background  
 04:04:27 **2** section when it discusses how a need exists in the art for  
 04:04:30 **3** the use of "methods and apparatus for dynamic application  
 04:04:34 **4** deeplink to transition from one user interface to another  
 04:04:36 **5** user interface and a mobile device." Because the typically  
 04:04:40 **6** used computerized process for computer promotion sign-up  
 04:04:43 **7** works in a different, less optimal way. And the Complaints  
 04:04:46 **8** also include some additional allegations about this topic of  
 04:04:49 **9** unconventional use of computer technology.  
 04:04:51 **10** Now, the Court wishes that those allegations had  
 04:04:56 **11** been more robust and that they had included more factual  
 04:04:58 **12** data and supported the idea that the claim's use of the  
 04:05:00 **13** particular ordered combination of steps amounted to the  
 04:05:03 **14** unconventional combination of otherwise known computerized  
 04:05:06 **15** processes.  
 04:05:07 **16** Even still, though, there's enough in the  
 04:05:10 **17** Complaints to at least indicate a plausible, factual dispute  
 04:05:13 **18** on that front. In part, the Court says so because the  
 04:05:16 **19** Complaint's allegations do state that the claim combination  
 04:05:19 **20** was not "well understood, routine or conventional" at the  
 04:05:23 **21** time. "Constituted technological improvements over  
 04:05:27 **22** traditional mobile sign-up and mobile messaging systems" and  
 04:05:30 **23** claim "an ordered combination of components interactions in  
 04:05:33 **24** an unconventional manner."  
 04:05:36 **25** And they do, at least at times, go on to allege

04:05:38 **1** that the invention's use of the technology at issue  
 04:05:41 **2** revolutionized the relevant field, which can be an indicator  
 04:05:44 **3** that they did so because they used computers in a new and  
 04:05:47 **4** different way from what was done before.  
 04:05:50 **5** Moreover, in at least the Postscript case,  
 04:05:52 **6** Plaintiff cited in Footnotes 4 to 6 of the Complaint to  
 04:05:56 **7** certain articles that can also support this notion of  
 04:05:59 **8** unconventionality. One such article, for example, stated  
 04:06:02 **9** that the patentee had explained that the problem with prior  
 04:06:05 **10** art computer solutions in this space was that "emails are  
 04:06:08 **11** slower, more crowded and a more cumbersome form of text  
 04:06:12 **12** messages. What's more, people today check and respond to  
 04:06:14 **13** texts at much higher volumes than emails."  
 04:06:17 **14** The article notes that it is "not just the  
 04:06:19 **15** outdated email problem that Attentive's text-based marketing  
 04:06:23 **16** method solves. Another major loss point in the computer to  
 04:06:26 **17** brand sign-up journey is the need to install new application  
 04:06:29 **18** on one's phone. People don't really want to download an app  
 04:06:33 **19** anymore, notes Long, the patentee's founder. That's where  
 04:06:37 **20** Attentive's two-tap sign-up solution comes in."  
 04:06:40 **21** A second article discussed how the claimed  
 04:06:42 **22** two-tap opt-in solution was a "key differentiator" from  
 04:06:47 **23** what other competing platforms were doing technologically in  
 04:06:51 **24** this space.  
 04:06:51 **25** Lastly, as the Court's noted today, the concern



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04:06:54 **1** that drives the Section 101 inquiry is on preemption, what  
 04:06:57 **2** the claim, including its asserted inventive concepts would  
 04:07:00 **3** tie up or preempt too much of all possible systems or  
 04:07:02 **4** methods for putting the abstract idea into practice.  
 04:07:06 **5** Here, as Plaintiff notes in its brief, while  
 04:07:08 **6** Defendants are correct that the abstract idea using  
 04:07:10 **7** pre-filled enrollment requests for prior use of the concept  
 04:07:13 **8** of receiving information about how to contact a customer, it  
 04:07:16 **9** is "not inherent that one must do so by having a  
 04:07:20 **10** click-to-text server transmit an integration tag to a client  
 04:07:23 **11** server which embeds the tag into a web page and serves the  
 04:07:27 **12** combination to a browser, which automatically executes the  
 04:07:30 **13** integration tag to return user data to "the server."  
 04:07:35 **14** And while the Defendant's right that the  
 04:07:36 **15** abstract idea of using pre-filled enrollment requests  
 04:07:39 **16** necessarily requires that the actual creation of such a  
 04:07:44 **17** "request," it is not inherent that one must accomplish that  
 04:07:47 **18** goal by having a click detect server send a custom URI with  
 04:07:51 **19** a deeplink to the browser for the browser to associate URI  
 04:07:54 **20** with the advertisement on the web page, that the URI to  
 04:07:57 **21** deeplink to a messaging application and for the deeplink to  
 04:08:00 **22** cause the application to create a pre-filled request for the  
 04:08:02 **23** custom text message."  
 04:08:04 **24** In making these statements, in the Court's view,  
 04:08:07 **25** Plaintiff, at least in part, is making a preemption argument

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04:08:09 **1** that the particular claim combination is simply one  
 04:08:12 **2** particular way, among many, for "streamlining the process  
 04:08:15 **3** for a customer to enroll in a marketing promotion by  
 04:08:19 **4** providing a pre-filled and pre-addressed request," that it  
 04:08:23 **5** may not, and it would preempt the relevant field. And the  
 04:08:25 **6** extent to which an order would not do so would amount to a  
 04:08:29 **7** factual dispute that would mitigate enhanced requirements of  
 04:08:32 **8** the motions in step two if the Court had equaled them  
 04:08:36 **9** together.  
 04:08:36 **10** So, for all those reasons, the Court will deny  
 04:08:39 **11** Defendants' motions on Section 101 grounds at step one. And  
 04:08:44 **12** it simply notes for the record that even if its call as to  
 04:08:46 **13** step one had been wrong, the Court would have still  
 04:08:50 **14** otherwise on this record denied the motion in step two.  
 04:08:53 **15** The Court also notes that it will endeavor to  
 04:08:55 **16** resolve the remainder of Emotive's motion with regard to  
 04:08:59 **17** plausibility issues as soon as it can. Likely, by the way,  
 04:09:01 **18** in short order that the Court will issue something on that.  
 04:09:04 **19** All right. With all that said, and many, many  
 04:09:08 **20** minutes, hours, the Court has resolved at least three  
 04:09:11 **21** motions that were pending today. As I said before, the  
 04:09:15 **22** Court's analysis here today, I will intend to take it and  
 04:09:19 **23** later put it into a written opinion which will simply  
 04:09:23 **24** include the transcript of what I said, will clean up any  
 04:09:26 **25** typos and will add citations that the Court does, indeed,

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04:09:30 **1** have in its notes before it, but simply didn't include today  
 04:09:33 **2** for sake of time.  
 04:09:35 **3** All right. So, with all that said, I want to  
 04:09:38 **4** say, again, thanks to counsel for their arguments today. I  
 04:09:43 **5** was thinking to myself that I was going to go home tonight  
 04:09:45 **6** and say to my family, You know, it was really interesting  
 04:09:48 **7** today working, this discussion in Court. I know when my  
 04:09:51 **8** kids ask me, What was the discussion about and I tell them  
 04:09:53 **9** it was about issues regarding patent eligibility, they're  
 04:09:57 **10** going to be disappointed in that. They'll say, Dad, that  
 04:10:02 **11** sounds boring.  
 04:10:02 **12** But I don't think it's boring. I think it's  
 04:10:04 **13** really interesting, and I'm really grateful to counsel for  
 04:10:06 **14** their thoughts and advice, not only on how to resolve these  
 04:10:09 **15** motions, but more generally on the concession of 101 in this  
 04:10:12 **16** context.  
 04:10:13 **17** So, with all that said, unless there's anything  
 04:10:15 **18** further, I know we're late in the day on a Friday, we will  
 04:10:18 **19** end our court hearing here today. I wish all of our  
 04:10:22 **20** out-of-town folks safe travel as they travel home. I look  
 04:10:24 **21** forward to talking to you and seeing all of you further in  
 04:10:27 **22** these cases in the future.  
 04:10:28 **23** And with all that said, the Court will stand in  
 04:10:31 **24** recess. Thank you.  
 04:10:32 **25** DEPUTY CLERK: All rise.

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**1** (Court was recessed at 4:10 p.m.)  
**2** I hereby certify the foregoing is a true and  
**3** accurate transcript from my stenographic notes in the  
**4** proceeding.  
**5** /s/ Heather M. Triozzi  
**6** Certified Merit and Real-Time Reporter  
**7** U.S. District Court  
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